Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

State of New Jersey, Department of Labor,
Petitioner,

v.

The Reconstituted Committee of Unsecured Creditors
of the United Healthcare System, Inc.,
Respondent.

**On Petition for A Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Unemployment Tax Act (FUTA), 26 U.S.C. § 3301, *et seq.*, imposes an excise tax on employers, based on a percentage of the total wages they pay each year, to meet the costs of providing unemployment compensation for their employees who have lost their jobs. States are required by the FUTA to allow non-profit organizations the option to pay unemployment taxes in advance, or to reimburse the State for unemployment benefits that the State pays to former employees of the organization. *Id.* §§ 3306(c)(8), 3309(a).

The question presented is whether this Court should grant certiorari to resolve the conflict among a growing number of circuits, whether, under this Court's *Anderson-Feiring* test, involuntary reimbursement obligations, imposed upon non-profit employers for the costs of unemployment compensation benefits, constitute excise taxes for purposes of the priority scheme of 11 U.S.C. § 507(a)(8)(E).

LIST OF PARTIES

The only parties to this proceeding are named in the caption. Since the Respondent had instituted this action in the context of the debtor's bankruptcy, the caption in the Court of Appeals lists the debtor, United Healthcare System, Inc. ("United") as well. However, United did not participate in the appeal at any stage.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of New Jersey, on behalf of the New Jersey Department of Labor, respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in this case, and resolve the extremely significant issue presented in this case, which is one that impacts all fifty States.

OPINIONS BELOW

The opinion of the Third Circuit is reported at 396 F.3d 247 (3d Cir. 2005) and reproduced at App.1 . The opinion of the District Court for the District of New Jersey is unreported and reproduced at App.36. The opinion of the Bankruptcy Court for the District of New Jersey is reported at 282 B.R. 330 (Bankr. D.N.J. 2002) and reproduced at App.38.

JURISDICTION

The Court of Appeals entered its judgment on January 24, 2005. There was no petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

1. 11 U.S.C. §507(a) (App. 58)
2. The FUTA, 26 U.S.C. § 3301 (App. 59); §3304 (App. 60); §3306 (App. 62); §3309 (App. 64).
3. N.J.S.A. 43:21-2 (App. 66)
4. N.J.S.A. 43:21-3 (App. 66)
5. N.J.S.A. 43:21-4 (App. 69)
6. N.J.S.A. 43:21-5 (App. 70)

7. N.J.S.A. 43:21-7 (App. 72)
8. N.J.S.A. 43:21-7.2 (App. 79).
9. N.J.S.A. 43:21-9 (App. 86)
10. N.J.S.A. 43:21-19 (App. 91)
11. N.J.S.A. 43:21-48 (App. 95).
12. Statement accompanying New Jersey Assembly No. 2501, *L.* 1971, *c.* 346 (App. 97).

STATEMENT OF THE CASE

After a debtor files a bankruptcy petition under Title 11 of the United States Code (the "Bankruptcy Code" or the "Code"), its assets are divided among its creditors, in accordance with the priority scheme established by the Code. The Code provides for a variety of debts to be given priority in payments, including a first priority for the administrative expenses of the case (such as taxes accruing after the petition is filed). *See* 11 U.S.C. §§ 507(a)(1). App. 58. The eighth priority covers a variety of taxes that accrued prior to the case filing, including excise taxes. *See,* 11 U.S.C. § 507(a)(8). App. 58.

The question presented in this case is whether the involuntary obligation of a non-profit organization to reimburse a State for the unemployment benefits paid by the State to the non-profit's laid-off employees, is an excise tax within the meaning of § 507(a)(8)(E). App. 58-59. The circuits are currently split on how to analyze and answer this question.

The starting point in every case involving application of 11 U.S.C. § 507(a)(8) is whether an exaction by a governmental unit is a tax. However, this fundamental issue – what is a tax – has been decided by lower courts under conflicting and widely divergent standards. Although this Court laid down a broad standard for determining whether an exaction is a tax in *State of New Jersey v. Anderson*, 203 U.S. 483 (1906), *City of New York v. Feiring*, 313 U.S. 283 (1941), and *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213

(1996), lower courts have added a number of additional, and divergent, factors to that test, creating confusion and ensuring a lack of uniformity in this area.

This case presents the Court with a needed opportunity to clarify this important area of the law. Taxes are the "lifeblood of government." *Bull v. United States,* 295 U.S. 247, 259 (1935). It is, therefore, critical for this Court to spell out the standards for determining when payments will be taxes so that all concerned can properly structure their programs so as to protect those vital revenues. Absent such protection, the States' ability to ensure that workers, their families, and business entities will be protected from the hardships caused by involuntary terminations, will be seriously impaired.

A. Statutory Background

New Jersey's Unemployment Compensation ("UC") laws, like those of every State, have been enacted pursuant to the FUTA, 26 U.S.C. §§ 3301-3311. The FUTA, which imposes an excise tax upon employers, is a "cooperative federal-state program of benefits to unemployed workers" to combat "widespread unemployment." *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 775, n.3 (1981). A State's UC laws must be federally approved and certified as being in compliance with the federal standards. *Id.* at n.3 (citing to 26 U.S.C. §§3304 and 3309[1]). If certified, "the State is authorized to receive a federal grant to administer the state plan." *California v. Grace Brethren Church*, 457 U.S. 393, 397 (1982).

FUTA requires State UC laws to provide that "all money" paid into the unemployment fund must be credited to the federal Unemployment Trust Fund and "all money withdrawn

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[1] Thus, with every amendment to the FUTA, "States correspondingly have amended their statutes to retain their federal certifications." *St. Martin Evangelical Lutheran Church, supra*, 451 U.S. at 775 n.4.

from the unemployment fund" must be used only to pay UC benefits. 26 U.S.C. §§ 3304(a)(3); (4); 3306. App. 60. FUTA requires nonprofit employers be subject to State UC laws. 26 U.S.C. § 3309(a). App. 64. FUTA however requires that State UC laws allow nonprofits the election to pay their UC liabilities as invoiced, or as quarterly self-assessments at an assigned rate, either of which must be paid "into the State unemployment fund . . ." 26 U.S.C. § 3304(a)(6)(B). App. 61.

New Jersey's UC laws comply with these requirements. Nonprofits must pay UC taxes as self-assessed contributions unless they elect to reimburse the UC fund. *See*, N.J.S.A. 43:21-7.2. App. 79. Monies collected from *all* employers, whether as contributions or reimbursements, are deposited *only* into the UC fund, which can be used *only* to pay UC benefits. N.J.S.A. 43:21-9(a); 21-9(b); 21-9(c). App. 86. The State's UC fund exists for the governmental purpose of providing benefits to unemployed workers. N.J.S.A. 43:21-2 ("economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people ... [therefore] a systematic accumulation of funds" for providing unemployment benefits required). App. 66.

UC benefits provided to employees of non-profit entities from the UC fund are identical to those provided to employees of for-profit entities, and such employees are entitled to receive benefits whether or not their employer has made any required payments. N.J.S.A. 43:21-3; 21-4; 21-5. App.66; 69; 70. The reimbursement amount required of non-profit entities fully covers those benefits, but does not include the costs of administration of the fund, additional disability benefits, and amounts to create a solvency reserve. N.J.S.A. 43:21-7(e); 21-48. App.77; 95.

B. Factual Background

United, a non-profit organization, was subject to the State's UC Laws. Prior to its bankruptcy, United elected the reimbursement method of paying its statutory UC liability.

After it filed for bankruptcy on February 19, 1997, United became a contributory employer, paying the unemployment taxes in advance, and having those amounts treated as administrative expenses.

The State filed two proofs of claim in United's case: a pre-petition, priority claim in the amount of $1,156,170.05 and an administrative claim[2] in the amount of $8,302,427.84. The priority proof of claim listed $932,704.37 (exclusive of interest) as reimbursement charges that arose pre-petition, while the administrative proof of claim was comprised of reimbursement charges that arose post-petition totaling $6,240,640.36 (plus interest of $1,982,520.58).[3]

C. Proceedings Below

The Respondent, the Reconstituted Committee of Unsecured Creditors of United Healthcare System, Inc., objected to the State's claims, asserting that reimbursement charges were not taxes entitled to priority status under 11 U.S.C. §507(a)(8), and should be reclassified as a general unsecured claim. The State maintained that its prepetition claim merited priority status under 11 U.S.C. §507(a)(8)(D) or (E), and that its postpetition claim was entitled to be treated as a first-priority administrative expense.

The Bankruptcy Court's extensive opinion agreed with the State's position that its claims were entitled to priority as an excise tax under 11 U.S.C. §507(a)(8)(E). App. 38. The court

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[2] These payments were made post-petition but were based upon pre-petition employment and wages paid to United's employees , and thus, before United returned to being a contributory employer.

[3] The claims also included unpaid employer State disability plan contributions and assessments, and worker unemployment and disability contributions, payable pursuant to N.J.S.A. 43:21-7(e) and N.J.S.A. 43:21-7(d)(1)(E). These liabilities are imposed upon all employers, including nonprofit employers who elect to make payments in lieu of contributions.

noted that both the FUTA and its legislative history "are simply silent as to how to characterize the payments in lieu of contributions" (App. 51) and that "[a]pplication" of the Supreme Court's broad definition of a tax set forth in *Feiring*, *supra*, and *Anderson*, *supra*, was not "an easy task ... in the bankruptcy context." App. 44. The use of additional limiting criteria by lower courts such as *In re Lorber Indus. of California, Inc.*, 675 F.2d 1062 (9th Cir. 1982) ("*Lorber*"), and *In re Suburban Motor Freight, Inc.*, 36 F.3d 484 (6th Cir. 1994) ("*Suburban II*")) had made the issue more complex and uncertain.

After examining all the relevant State statutory UC provisions in this regard, the Bankruptcy Court ruled that (i) the exactions in the form of reimbursements were "an involuntary pecuniary burden imposed by the legislature," since United, like any other employer, was obligated by State statutes to finance and make payments into the State's UC fund, and thus, "was only able to choose how to make the payments, not whether to make the payments;" (ii) New Jersey UC laws were enacted purely "for a public purpose and pursuant to the police power" of the State, and (iii) that the reimbursement scheme met even the added limitations imposed by *Suburban II*, *supra*, in that the exactions were "universally applicable" and no private creditors with like claims were disadvantaged.[4] App. 47, 48.

The court further held there was no "material difference" between contributions and payments in lieu of contributions, and that both went into the UC fund to pay "benefits designed to prevent unemployed workers from becoming a public burden." App. 48-49. Congress had not intended to exempt

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[4] The court found that the State's ability to secure a surety bond from an electing employer, while not necessarily a non-tax attribute, may be viewed to violate the additional requirement in *Suburban II*, *supra*, that a surety with an identical claim should not be disadvantaged. App. 53. Even so, the court held, this "single non-tax characteristic" would not suffice to deny the reimbursement scheme as being a tax. *Ibid.*

nonprofits from payment of "state unemployment taxes," but only to "a reduced tax burden." App. 51. The court concluded that the reimbursements were excise taxes, because "like contributions [they] arise from the privilege or act of employing workers." App. 54. Thus, the State's claims were entitled to priority under Section 507(a)(8)(E).[5] *Ibid.* The District Court affirmed in all respects. App.36.

D. The Court of Appeals Decision

In a 2-1 opinion, the Third Circuit reversed. App.1. The majority noted that this Court's decisions dealing with the question of "what is a tax"– *Anderson, supra,* and *Feiring, supra* – were not dispositive because they were decided under the Bankruptcy Act, which purportedly provided a broader priority treatment of "government obligations" than under the Code's current tax priorities. App. 9. Accordingly, it sought to apply the "functional" analysis in *CF & I* (which had been used to determine whether a payment was a tax or a penalty) to aid it in determining whether the reimbursement was a "tax" or some other form of "government obligation." App.14-15.

The majority acknowledged the case as a "close one" since "reimbursement payments and quarterly contributions are complementary." App. 19. The court concluded, however, that because the reimbursements are "direct[ly] correlat[ed]" to the payments made by the State to the laid-off employees, they were "an alternative to paying taxes rather than ... an alternative method" of paying taxes. *Ibid.* The FUTA was "germane" only insofar as it mandated States to provide the choice of payment, but did not decide "the question surrounding the nature of this obligation." App. 23.

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[5] The court held that the postpetition portion of the taxes would not be given first-priority administrative status, because they were based on pre-petition employment. App. 56. The State did not appeal the administrative status determination. The court also ruled against the State's alternative argument that the claims were entitled to priority status under Section 507(a)(8)(D), App. 54, and the State did not appeal that issue.

The majority held that the contributions and reimbursements were distinct obligations because they were stated in separate sections of the statute, N.J.S.A. 43:21-7 and N.J.S.A. 43:21-7.2 respectively, and were defined separately in one section of another statute, N.J.S.A. 43:21-19(f).[6] App. 20. It further held that the reimbursements "do not raise funds to support a general government undertaking," unlike contributions, because the payments "only reimburse" the State for specific payments it has made. App. 21. Thus, while reimbursement payments are "intermingled in the same state fund" with all other contributions, they are "more like a promise [by the non-profit employer to pay] in exchange for the privilege of employing individuals in the state without being required to pay state [UC] obligations." App. 22.

The statutory scheme, according to the majority, created a contract between the State and a non-profit employer by which "[t]he state will allow" such an employer "to conduct business without" contributing to the state UC fund, and in exchange, "the state will pay the [UC] benefits" to the employees. *Ibid.* This relationship, the court held, resulted in "a debt." *Ibid.* This alleged debt was akin to a fee (as in *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974)), because the State purportedly bestowed a benefit on non-profit employers not available to other employers, namely, the option of funding the UC costs on a reimbursement basis. App. 23.

Chief Judge Scirica dissented. While viewing this as a "difficult and close case," in light of the clear public purpose of the UC laws and the involuntary nature of the exactions (since the electing employer could not "evade its responsibility to the [UC] fund altogether"), he concluded that the reimbursements "more closely resemble a tax than other kinds of government assessments, fees in exchange for benefits, or penalties." App.

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[6] N.J.S.A. 43:21-19(f) defines "contributions" as "money payments to the State Unemployment Compensation Fund." The same sub-section defines "payments in lieu of contributions" as "money payments to the State Unemployment Compensation Fund" made by electing employers. App.91.

24-31. Any distinction between the contribution and reimbursement methods of funding the State's UC fund was more of "degree rather than kind." App. 24.

The Chief Judge reasoned that the "statutory purpose of the obligation is to benefit the former employees and the public good, not the employer." App. 28. The reimbursements method of payment did "not grant an affirmative benefit on the non-profit employer." App. 28-29. The debtor was not given a benefit of being allowed to operate in the State without making contributions to the UC fund. Like all other employers, it was saddled with an involuntary burden to "support the [UC] fund" *albeit* allowed to use a different means to satisfy the obligation. App. 29. The dissent concluded that the reimbursements qualified as a priority excise tax. App. 31.

REASONS FOR GRANTING THE WRIT

This case cries out for review by this Court. The issue significantly and adversely affects the taxing powers of the State and the proper administration and funding of the State's UC funds. The issue equally impacts all fifty states with respect to their right to tax nonprofit employers operating within their borders, and exact such tax as reimbursements.

The fundamental question of "what is a tax?" and what standard shall be used to judge that question, arises not just in unemployment compensation but in many other, equally critical areas. It has, for example, confounded the courts in the context of state Workers Compensation (WC) programs. Those programs use a wide variety of means to initially fund the costs of the program (including direct premium payments to the states as the sole provider of benefits, payments to the state as an alternative to private insurance coverage, or self-insurance by the employer). Virtually all states also pay benefits to workers whose employers have failed to obtain insurance or can no longer afford to satisfy their self-insurance obligations and

impose reimbursement obligations on those employers, akin to those imposed on the non-profit entities here.

The courts, however, have struggled in recent years with how to determine whether the reimbursement obligations are taxes and entitled to priority treatment. When courts relied only on the *Anderson-Feiring* test enunciated by this Court, they had relatively little difficulty in completing the analysis with respect to any of these benefit payments. However, a number of courts – most notably the Sixth Circuit – devised new tests to determine when a government payment is a tax for priority purposes. Since the addition of those new factors, there has been a rising chorus of complaint from the courts about the purported difficulty of applying the original *Anderson-Feiring* test. Moreover, in marked contrast to the largely uniform treatment of all of these payments as taxes in earlier years, many recent decisions have denied that treatment to one or more of these types of obligations. It is as to those accretions onto this Court's holding, and their devastating effect on the availability of funding for employee benefits, that the State seeks review.

In particular, in this case, by converting a FUTA-mandated alternative method of collecting tax obligations into a contract between the State and electing non-profit employers, the Third Circuit's decision has subverted the express intent of the FUTA to allow States to impose UC taxes on every nonprofit employer. With the ever-increasing number of bankruptcy filings by non-profit entities in recent years, which almost inevitably will result in layoffs, the States' UC fund will incur substantial costs to provide benefits to the employees of those entities. If those funds are not collected from the non-profit employer in question, the result will be to force higher premiums to be assessed against other employers, thus impairing their operations, and possible jeopardizing continued payments. The result would imperil the solvency of the very funds established to protect employees who have lost their jobs through no fault of their own.

It is, therefore, critical for this Court to spell out clearly what are the standards for determining when payments will be taxes so that all concerned can properly structure their programs so as to protect those vital revenues. The impact of this issue, nation-wide requires review by this Court. Determination of the universally applicable and proper standard will help the courts in resolving these oft-occurring issues, not only for UC reimbursements, but also as to a wide variety of payments.

I. UNDER THIS COURT'S STANDARDS, THE REIMBURSEMENT OBLIGATIONS OWED HERE WOULD BE HELD TO BE EXCISE TAXES.

In determining whether a state exaction is an "excise tax," the first issue that the Court must determine is whether the payment is a tax at all. Almost a hundred years ago, this Court stated the parameters for that judgment for the purpose of applying priorities in a bankruptcy case. "Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government . . . " and "capable of being enforced by action against the will of the taxpayer." *Anderson*, *supra*, 203 U.S. at 492. While a debt is an "obligation for the payment of money founded upon contract, express or implied" a tax is "levied for the support of the government or for some special purpose authorized by it" without a "taxpayer's consent." *Ibid.*

This Court reiterated those parameters 35 years later in the *Feiring* case, stating that "the [bankruptcy] priority . . . extends to those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of the government or of undertakings authorized by it." *Feiring*, *supra*, 313 U.S. at 285. While the measure was in the form of a sales tax, it was enacted as "an emergency revenue measure to defray the expense of unemployment relief." The Court held that the levy was a tax, because a "pecuniary burden so laid upon the bankrupt . . . for the support of the government, and without his consent thus has all the characteristics of a tax entitled to priority of payment in

bankruptcy." *Id.* at 287. Thus, while "an ordinary debt due the state is not entitled to priority," a "demand . . . for a tax, the unqualified duty to pay which was placed by the statute on the seller" is so entitled. *Id.* at 288.

Fifty-five years later, in 1996, the Court reaffirmed the time-tested *Anderson-Feiring* standard in the case of *CF&I Fabricators, supra,* stating that "[a] tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.'" 518 U.S. at 224 (quoting *United States v. La Franca*, 282 U.S. 568, 572 (1931)). The Court noted that despite the passage of time, and amendments to the Bankruptcy Code with respect to treatment of taxes in bankruptcy, Congress had never rejected its statement of the tests in *Anderson, supra*, and *Feiring, supra,* or tried to create a different test. *CF&I Fabricators, supra*, 518 U.S. at 224.

During that time period, the Ninth Circuit restated the *Anderson-Feiring* test in *Lorber, supra*, 675 F.2d at 1066, and held that an exaction was a tax if it was (i) an involuntary pecuniary burden, (ii) legislatively imposed; (iii) under the police or taxing power of the state; and (iv) for public purposes, including the purposes of defraying expenses of government or undertakings authorized by it. While somewhat more elaborate than this Court's version of the test, *Lorber* appears to add nothing of substance, so that cases analyzed under that test are equally applicable here.[7]

In applying the pure *Anderson-Feiring* (and *Lorber)* test to all three types of payments (UC reimbursements, WC reimbursements, or WC premium payments), courts initially had little trouble in concluding that the payments were "taxes"

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[7] The issue in *Lorber* turned on how to decide whether a payment owed to the state was being made"voluntarily" so as to constitute a fee, or whether it was an involuntary payment so as to constitute a tax. That inquiry is equally relevant under this Court's test.

for purposes of bankruptcy priorities.[8] In *In re Pan American Paper Mills*, 618 F.2d 159, 162 (1st Cir.1980), for instance, the First Circuit held that WC premiums, like UC contributions, were entitled to the "tax" priority under Section 64(a)(4) of the Bankruptcy Act, noting that the "pertinent questions about a so-called premium are whether the government compelled the employer to pay the exaction and whether the payment was for a public purpose." Similarly, in *State Indus. Acc. Com'n v. Aebi*, 162 P.2d 513 (Or. 1945), the court found that WC premiums, like UC contributions, were required payments made for a public purpose, even though the employer had the ability to opt out of the WC system entirely (and remain exposed to tort liability). Moreover, the court rejected the notion that the payments were any less a tax because the law did not equally protect "an insurance carrier claiming unpaid insurance premiums from a bankrupt. This is not an inconsistency. It is merely an example of the distinction between the sovereign power of the state and the rights of private citizenry." *Id.* at 371.

The Fourth Circuit explicitly adopted that view in *New Neighborhoods, Inc. v. West Virginia Workmen's Comp. Ins. Funds*, 886 F.2d 714 (4th Cir. 1980), where it concluded that WC premiums were taxes, and that it was irrelevant that the same priority might not accrue to a private WC insurer (quoting from *Aebi, supra*).

Cases applying the *Anderson-Feiring-Lorber* test to find that UC reimbursements were excise taxes include *In re Cottage Grove Hosp.*, 265 B.R. 241, 247 (Bankr. D. Ore. 2001) ("[n]o sound public policy" to distinguish UC and WC

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[8] Because of the universal obligation on for-profit employers to make unemployment contributions, the fact that the state is the single payor of unemployment benefits to employees, there has been little or no dispute that contributions owed by employers (either for-profit or non-electing tax exempt employers) are excise taxes. *See, e.g., In re Wm. Akers, Jr., Co.*, 121 F.2d 846 (3d Cir. 1941); *In re Mid America Co.*, 31 F.Supp. 601 (S.D.Ill. 1939). United itself is one such example. App. 41.

reimbursements); *In re Parkview Hospital-Osteopathic Medical Center*, 211 B.R. 603, 612 (Bankr. N.D. Ohio, 1996); (not "patently unreasonable" to deem reimbursables a tax). *See, also, In re Sacred Heart Hosp. of Norristown*, 209 B.R. 650 (E.D.Pa. 1997) and *In re Boston Regional Medical Center*, 256 B.R. 212 (Bankr. D. Mass. 2000), *aff'd*, 265 B.R. 838 (1st Cir. B.A.P. 2001) – both of which found the payments to be taxes, and both of which were overruled – *Sacred Heart* by the decision at issue here, and *Boston Regional* by *In re Boston Regional Medical Center, Inc. ("Boston Regional I")*, 291 F.3d 111 (1st Cir. 2001) *Cf., In re Northeastern Ohio General Hosp. Ass'n*, 126 B.R. 513, 515 (Bankr. N.D. Oh. 1991) ("undisputed" that UC reimbursements are a tax).

In the WC area, cases using the *Anderson-Feiring-Lorber* test to deem the exactions a tax, include *In re Camilli*, 94 F.3d 1330, 1333 (9th Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997) (reimbursement obligations "part of a complex system designed . . . to provide universal availability of workers' compensation benefits to employees in the state;" obligation was "the product of legislative fiat; . . . wholly beyond the control of the debtor"); *In re Voightman*, 239 B.R. 380 (8th Cir. BAP 1999) (premiums); *In re Waldo*, 186 B.R. 118, 125 (Bankr. D. Mont. 1995) (reimbursement) *aff'd*, 108 F.2d 340 (9th Cir. 1997); *In re Chateaugay Corp.*, 177 B.R 176, 184 (S.D.N.Y. 1995), *aff'd on other grounds*, 89 F.3d 942 (2d Cir. 1996) (premiums); *In re Hutchinson*, 135 B.R. 890 (Bankr. D.Az. 1992) (premiums); *In re Tri-Manufacturing and Sales Co.*, 82 B.R. 58 (Bankr. S.D. Ohio 1988) (premiums); *In re Beaman*, 9 B.R. 539 (Bankr. D.Ore. 1980) (reimbursements). *But, see, In re Carlton Enterprises, Inc.*, 103 B.R. 876 (Bankr. N.D. Ohio) (1989) (reimbursements not excise tax).

Had this Court's test been the only standard used, there is little doubt that the State's UC reimbursement claim, as in the numerous cases cited above, would have been found to be an excise tax. The claim arose from a mandatory obligation, imposed on the employer by statute, to comply with one of two alternative means of satisfying its duty to provide for its laid-off

employees. The State law explicitly provides that such benefits are provided for the public good, N.J.S.A. 43:21-2, (App. 66) and the courts have universally concluded that the unemployment compensation system are for an appropriate governmental purpose and an undertaking for the common welfare. As such, it was plainly a tax. The only remaining issue is whether it is an "excise" tax, an issue as to which courts generally have had no difficulty in finding for the government.[9] Absent the confusion engendered by the recent line of cases, it is unlikely that any court would have required any further analysis.

II. THE USE OF ADDITIONAL CRITERIA FOR DECIDING "WHAT IS A TAX" VIOLATES THIS COURT'S RULINGS AND HAS CREATED A CIRCUIT SPLIT

Rather than applying this Court's existing, straightforward analytical standard, the court here concluded that it was required to engage in a far more searching analysis and to review an entire series of factors to make a "functional analysis" of whether this payment was a tax, or some sort of contractual debt. App. 19-24. That analysis, in turn, arose out of a series of cases in which "lower courts have . . . struggled in applying the *Feiring-Anderson* analysis" in bankruptcy cases. *In re Boston Regional Medical Center,* 365 F.3d 51, 58 (1st Cir. 2004) (*"Boston Regional II"*).

In particular, in *In re Suburban Motor Freight, Inc.*, 998 F.2d 338, 341 (6th Cir. 1993) (*"Suburban I"*) (dealing with WC premiums), the Sixth Circuit expressed strong concerns about

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[9] Note that in *Suburban II,* the Sixth Circuit agreed that if the reimbursements were a tax, they would be an excise tax as being "indirectly assessed ... on [the] 'transaction or act of employing.'" *Id.*, 36 F.3d at 488, n.2. The cases noted above also concluded that the UC and WC payments were "excise" taxes. *But, see, In re George*, 361 F.3d 1157 (9th Cir. 2004), denying excise tax status to WC reimbursements because they were not imposed on a "transaction," but on the failure to obtain insurance.

whether application of the *Anderson-Feiring* test was too generous and stated that "overemphasis on the 'public purpose' element would eliminate all distinction between 'taxes' and 'fees' or other money owed the Government, enabling the State to prevail consistently against private creditors with arguably equal claims." *Id.* at 341. It noted that "[t]his Circuit has stood nearly alone in expressing this concern." *Ibid.*

A year later, in *Suburban II*, *supra*, where the State sought to also be reimbursed for the actual benefits it paid to the debtor's employees, the Sixth Circuit returned to the concerns that it had expressed in *Suburban I*, about the assertedly overly generous standard created by the *Anderson-Feiring* test. Therefore, the *Suburban II* court concluded that two additional requirements must be added to the *Lorber* test so as properly to distinguish taxes from fees or other payments to the government. The court must find that a governmental exaction is (i) "universally applicable to similarly situated entities; and (ii) that according priority treatment to the government claim [will] not disadvantage private creditors with like claims." *Id.*, 36 F.3d at 488-89. Under this new test, it concluded that the reimbursement obligation was *not* a tax.

Since that decision, the Sixth Circuit no longer stands alone. To the contrary, its new test has gained numerous adherents, and led many courts to conclude that they must engage in detailed examinations of the minutiae of state payment obligations to determine if they resemble claims owed to any other party, or if they lack some degree of universal coverage. *See, e.g., In re Payne,* 27 B.R. 809 (Bankr. D. Kan. 1983) (reimbursement of workers benefits paid by State not a tax because the of the predominant non-tax characteristics such as, remedies available to the worker against the employer, no automatic statutory lien in favor of State, and State's status more as a subrogee); *In re Freymiller Trucking, Inc.*, 194 B.R. 914 (Bankr. W.D. Okla. 1996) (reimbursements not a tax because under *Anderson*, *supra*, they were not assessed at a fixed rate, and were akin to a subrogation claim); *Worker's Compensation Trust Fund v. Saunders*, 234 B.R. 555 (D. Mass.

1999) (*Anderson-Feiring* test ignores the "critical question" of whether granting "priority status to a governmental claim meets the purposes and policy" of the Bankruptcy Code); *In re Park*, 212 B.R. 430 (Bankr. D. Mass. 1997). *See, generally*, Andrew M. Campbell, *What Claims of Governmental Units Constitute Taxes Qualifying For Priority Under Provisions of § 507(a)(8) of Bankruptcy Code (11 U.S.C.A. §507(a))*, 148 *Am. Law. R. Fed.* 351 (2004). In the process, rather than providing greater clarity, it have only spawned more confusion.[10]

In suggesting, moreover, that the limitations were needed because the *Anderson-Feiring* test was purportedly not well-suited to bankruptcy issues, those cases ignore the fact that both *Anderson* and *Feiring were* bankruptcy cases and analyzed precisely the same priority issues courts face now. Thus, the continued reluctance of many lower courts to apply this Court's test, without added embellishments and limitations, simply cannot be justified by a purported need to deal with "new" issues that had not confronted this Court.

Instead, the use of added tests to "protect" creditors from what is viewed as an overly generous test, appears to be more akin to the reasoning used by the Sixth Circuit in *In re First Truck Lines, Inc.*, 48 F.3d 210 (1995), where it relied on its view of appropriate bankruptcy policy considerations as a reason to override the Code's grant of administrative status to postpetition tax penalties. The Court overruled that decision in *U.S. v. Noland*, 517 U.S. 535 (1996) holding that courts could not take upon themselves the power to make a "categorical determination" that such penalties did not warrant priority status in order to further the goals of the Code. This Court

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[10] Ironically, while *Suburban II* found the WC reimbursements were *not* taxes, virtually all other courts considering the issue under the *Suburban II* test *have* found them to be taxes. *See, e.g., Camilli, supra,; In re Hynes*, 229 B.R. 405 (Bankr. W.D. Mi. 1998)*; In re Olga Coal Co.*, 194 B.R. 741 (Bankr. S.D.N.Y. 1996). *But, see, George, supra.* This contradiction suggests that the Sixth Circuit was simply using the tax issue to address other concerns it had with the State's claim.

reiterated that principle in *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 24-25 (2000) noting that "[b]ankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides." In doing so, it similarly rejected the lower court's attempt to impose a new, bankruptcy-specific standard for proving tax claims, merely in order to satisfy a perceived need to improve on the statute, as written.

The decision below similarly evinces a view that the courts must invent a more searching test in order to satisfy the goals of the bankruptcy system, asserting that the *Anderson-Feiring* test must be updated because the scope of priority "government obligations" had changed since the Bankruptcy Act was replaced by the Code App. 9, 14. That statement though, ignored the fact that the priority provisions of both the Act and the Code that the Court addressed in its *Anderson-Feiring* test dealt explicitly with "taxes," not some amorphous and changing category of "obligations." While the Act gave priority to *all* taxes, and the Code gives priority to only *some* taxes, nothing in that limitation suggests any reason to use a different test to determine the basic question of what *is* a tax. Indeed, this Court expressly reiterated its basic test as recently as 1996 in *CF & I, supra*. There also, this Court rejected a bankruptcy court's equitable subordination of a government penalty claim because of the lower court's justification that governmental claims should be downgraded to better serve the needs of other creditors in the case. *Id.*, 518 U.S. at 227-28.

Despite the repeated endorsement by this Court of its broad *Anderson-Feiring* test, and its other cases rejecting efforts by lower courts to strain the language of the Code dealing with the priorities for government claims, the decisions since *Suburban II* have increasingly moved away from applying that test on its own terms. In doing so, though, the use of *Suburban II's* new requirements has caused much difficulty for the courts and led some to rely on a plethora of factors to deny tax status to state claims.

The search for similar creditors in the case who might be disadvantaged by granting tax status to the State's claim, for instance, has been applied even if the absence of any actual creditor. In *George*, *supra*, for example, the Ninth Circuit held that "if a creditor similarly situated to the government can be *hypothesized* under the relevant statute, then [even] by the reasoning of *Camilli*, the government claim is not a tax." *Id.* at 1162 (emphasis added) (thus, disavowing its own prior decision that WC reimbursements are a tax in *Camilli*). Simply because there *might* be another employer that *might* have a separate obligation to pay benefits to an uninsured employee with a cumulative injury, which employer's contribution claim against the debtor *might* compete with the State's reimbursement claim, so that the employer *might* be disadvantaged if the State's claim were treated as a tax. That string of possibilities, the Ninth Circuit held, was enough to deny tax status to the State's claim.

Indeed, *Suburban II* gives no clear basis for how to define which entities are "similarly situated,." thus generating new bases for debtors to challenge state claims[11] Nor does it explain how its new requirement squares with the principle that taxes need not be applied to all entities, but may be restricted to certain classes of employers. Similarly, the determination of which private entities have "like" claims, nor when a requirement is "universally imposed," has not been easy.[12]

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[11] In *Voightman*, *supra*, for example, the debtor unsuccessfully challenged the WC premiums because the system did not apply to farmer-employers, which it claimed were similarly situated to other business employers.

[12] In *In re Park*, *supra*, for instance, the court denied tax status to the state's WC reimbursement claim because the state law only required such payments to be made by uninsured employers who had injured employees who were paid from the Fund. 240 B.R. at 436. The fact that such employers were the only ones who *could* engender a liability to the state, and who, therefore, could incur such a tax debt, was apparently irrelevant in the court's view. In *Saunders, supra*, on the other hand, the court held that a state's reimbursement scheme was not universally applied

The lower courts' struggle to interpret and apply the various proposed tests has been noted by a variety of courts. *See, e.g., Boston Regional I*, 291 F.3d at 121; *In re Park*, *supra*, 212 B.R. at 435-36 (observing the profusion of cases and standards); *Saunders*, *supra*, 234 B.R. at 562-564. The result has led to courts to look to a profusion of inconsistent factors, although rarely with any agreement on their significance, none of which are dictated by this Court's test, to decide whether a payment is a tax. In *Boston Regional I*, for instance, the court observed that the current morass of decisions could "arguably" make UC reimbursements a tax, but the analysis was "flexible enough" to deny tax status to the obligations. *Id.* at 121-22. The court placed great weight, though, on the fact that non-profit employers were not charged for the fund's "administrative costs, additional benefits, or the solvency margin" and that the government could have, but did not procure a surety bond, finding that the latter factor "tip[ped] the scales" in favor of the payment not being a tax. *Ibid. See, also*, *In re Freymiller Trucking*, *supra*, 194 B.R. at 917 , where the court relied on the fact that reimbursements were not assessed at a fixed rate, and thus, not a tax, although nothing in this Court's test imposes that requirement.

The First Circuit after determining that UC reimbursements were not taxes, revisited the priority tax issue with respect to assessments imposed on all health care facilities in the state to create the Uncompensated Care Pool that reimbursed facilities with a disproportionate amount of uncompensated care for indigent patients. The court concluded that the fund payments *were* taxes and "fit[] sufficiently within the broad definition of an excise" tax, although the assessments were not uniformly imposed at the same rate, and although the assessments were a condition to maintaining a license. *Boston Regional II*, 365 F.3d at 55, n.3, 64-65. In so concluding, it again noted that the

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merely because it stated that the state "may" seek reimbursement from a non-profit employer, but not that it "shall" do so. 234 B.R. at 565.

conflicting opinions in this area made its task a "struggle."*Id.* at 58.

In the present case, the Third Circuit disagreed with the reasons the First Circuit relied upon in *Boston Regional I* to find that the UC reimbursements were not a tax, and specifically rejected the First Circuit's view that the availability of a bond weighed against tax status. App. 19-20. Nevertheless, the court reached the same result by its "functional approach," after agreeing with the views expressed in *Suburban II*. In doing so, it overruled the decision in the *Sacred Heart, supra*, which had found such payments to be taxes based on a straightforward application of the *Anderson-Feiring-Lorber* test. App. 20.

As the cases discussed above demonstrate, and as pointed out over and over again by the circuit courts, the general issue of what standard to use to decide "what is a tax," and the particular issue of whether UC reimbursements are taxes, have continued to confound the courts. The cases have had varying results in recent years, with some courts applying the *Anderson-Feiring-Lorber* test, while other courts have held that they must also give a "particular and separate weight to the Bankruptcy Code's principle of equal distribution of the debtor's estate," the factor which led to the Sixth Circuit's introduction of additional, limiting factors in *Suburban II*. *See, Boston Regional II*, 365 F.3d at 58. In light of these conflicting standards and decisions, it becomes ever more difficult for legislatures to determine what *is* a tax, and how to structure revenue requirements so as to ensure that amounts owed to the government *will* be treated as taxes.

III. FAILURE TO REAFFIRM THE CONTINUING VITALITY OF THE *ANDERSON-FEIRING* TEST WILL HAVE SERIOUSLY DETRIMENTAL CONSEQUENCES ON THE STATES

These cases have thus left the certainty of the reimbursement method of financing a fund in a state of flux.

Only this Court can bring a proper and final resolution to this crucial and significant issue that impacts all fifty States. The States are forced by federal law to offer non-profit employers the right to use the reimbursement method of payment of their share of the UC costs, to support the government's undertaking to provide UC benefits to unemployed individuals, as a means to survive during their period of unemployment.

The opinion at issue here, and that of the First Circuit in the unemployment context, directly undermine this federal-state co-operative effort. By arbitrarily transforming a required reimbursement tax into a fee or a contractual debt, the decisions greatly diminish government's ability to further the public policy goal of paying benefits to *all* unemployed workers. Similar decisions in the workers' compensation area equally undercut the government's ability to ensure that *all* workers injured or made ill in their employer's service receive benefits, without unduly burdening the State or other employers within the State.

The opinion of the court of appeals has shaken the very integrity and solvency of the States' UC fund, a fund held in trust for payment of unemployment benefits. As aptly stated by the Fourth Circuit, denying priority status to a state's claim would enhance the share of the general unsecured creditors, who might be seen as the "'little fellows' [b]ut so are the injured employees who depend upon the financial soundness of the Fund and are thus indirectly benefitted by priority status in bankruptcy." *New Neighborhoods, supra* 886 F.2d at 719. *See, also, Boston Regional II*, 365 F.3d at 65 (even if loss due to reclassification of State's claim is passed on to other non-debtor hospitals, State still loses because the hospitals are "instruments of the government's intended services to indigents: losses to them impact adversely the public program").

Those concerns apply with considerable and equal force here. The State's loss will, in the end, also be visited upon its citizens and businesses. If the State cannot recover the amounts

unpaid by nonprofit debtors that have elected reimbursement status, it will be forced to increase the tax paid by financially responsible employers to maintain the UC fund and adhere to the permeating public purpose of maintaining such fund. The burden of covering unpaid bankruptcy losses should not be borne by all other financially responsible employers, when such additional tax liability could jeopardize *their* economic stability and ability to maintain their own work forces.

Alternatively, or additionally, the State could be forced to seek surety bonds from non-profit entities for the full amount of their potential unfunded liabilities. Those amounts, as shown here, could be enormous, if they are set at an amounts high enough to fully protect the UC fund from the severe depletion resulting from the loss of tax status.[13] Bankruptcies of non-profit employers have become more prevalent and each such case could implicate this issue. If the State cannot be protected during the claims process, it will be obligated to impose higher burdens on *all* such employers in order to avoid future problems. As pointed out by the dissent in this case, relegating the reimbursement payments to a general unsecured status "will likely increase the non-profit employers' operating costs" if the State would be forced to seek surety bonds in the future. App. 30. The absence of a mandated bond reduces the "costs to the non-profit employers of doing business in New Jersey" as does permitting them to finance the UC fund on a reimbursement basis. *Ibid.* The majority's ruling would force the State to"require a bond" from the reimbursable employers, defeating FUTA's purpose of "minimiz[ing] the cost of non-profit organizations' participation in the [UC] scheme." *Ibid.*

Moreover, even if legislatures attempt to restructure their revenue programs to satisfy these new standards, the confusion and ambiguities noted above will continue to confound their efforts and limit their ability to appropriately tailor their use of

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[13] Here, for instance, the State could lose as much as $8 million of its $9.5 million in claims if its reimbursement obligation is treated as a general unsecured claim instead of a tax obligation.

their taxing powers. The creative use of the "fee" concept by the Third Circuit's decision herein, to avoid treatment of the State's claim as a tax, shows the issues that can be created even with respect to legislation that was plainly designed to impose a universal revenue obligation. Such problems are neither inherent in the Code, nor required by this Court's prior decisions. They arise solely from the failure of some courts below to follow this Court's prior guidance.

. The difficulties for States that are engendered by the new tests will continue until this Court returns to the issues that it thought had been put to rest in *Feiring* and provides additional guidance to the lower courts on how to determine which involuntary state exactions truly are taxes. Accordingly, this case should be reviewed and resolved in all respects by this Court. The public interest is best served by immediate determination of this important federal issue so that state officials are not forced to implement remedies to protect the integrity of the UC fund that may adversely affect the very employers purportedly being protected by these provisions. *See, Reading Co. v. Brown*, 391 U.S. 471, 475 (1968) (certiorari granted "because the issue is important in the administration of bankruptcy laws and is one of first impression in this Court"); *Protective Comm. for Indep. Stockholders of TMT Trailers Ferry, Inc. v. Anderson*, 390 U.S. 414, 418 (1968) (certiorari granted as case "present[ed] important questions under the bankruptcy laws"). Each of the fifty States will be impacted by the resolution of this federal question, therefore, this Court's review is of crucial and vital significance.

IV. THE THIRD CIRCUIT ERRONEOUSLY CONCLUDED THAT FINANCING OF THE UC FUND BY REIMBURSEMENTS WAS NOT A TAX.

Certiorari is also warranted because the decision below is plainly wrong. The majority opinion of the Third Circuit, informed by the added complexities it erroneously viewed as being required under *Suburban II*, erred in concluding that the

reimbursement method of payment does not support the costs of a government undertaking. The court's hyper-technical reliance on mere historical quirks of drafting ignores the overall structure of the funding obligations.[14] Both obligations are defined identically to mean "payments made into the UC Fund." N.J.S.A. 43:21-19(f). Both obligations go into the same fund. N.J.S.A. 43:21-9(a). The money in the fund is used to pay the same amount of unemployment benefits for the employees of *all* employers.[15] *All* employers must make the payments they are liable for from their own funds and cannot deduct any sums from their employees' salaries. N.J.S.A. 43:21-7.2 (d); 43:21-7(a)(1). Costs and assessments to maintain the UC Fund are imposed upon *all* employers, including electing non-profit employers. N.J.S.A. 43:21-48.

Second, the court's conclusion that reimbursements were "a promise in exchange for the privilege of employing" persons within the state (App. 22) is incorrect. The relationship between the States and the non-profit employer is not one of voluntary, arms-length contractual partners. Indeed, States have no choice about whether to operate a UC system for the benefit of their citizens and the economy as a whole. In operating that system, they have no choice about whether to allow the reimbursement option to the non-profit. The non-profit employer has no choice about being required to pay for the cost of UC benefits for any persons that it employs within the State or any ability to negotiate for a lesser amount of benefits to be afforded to its employees in return for a lesser amount of payments to the states. The ability of the non-profit to opt to take advantage of a less costly option for satisfying its obligation to its employees does not make the exaction a type of voluntary fee. To suggest

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[14] The reimbursement obligation is included in a separate section simply because it was added in 1971 after Congress changed the federal FUTA in 1970 to cover non-profit employers, and allow States to tax them, *albeit* by use of the alternative means of payments. *See*, Statement accompanying Assembly No. 2501, *L.* 1971, *c.* 346. (App.112).

[15] N.J.S.A. 43:21-9(b); (c); N.J.S.A. 43:21-7.2 (d); 43:21-7(a)(1)

that such a relationship, that is hemmed in and defined at every level by federal and state law, is a voluntary contract, that merely creates a debt, makes a mockery of the"involuntariness" requirement under *Anderson-Feiring*, in addition to grossly misinterpreting State law. As the dissent correctly pointed out, far from being afforded a benefit, non-profit employers are burdened with a new duty to "support the [UC] fund" in order "to benefit the former employees and the public good, not the employer. App. 28, 29.

The State's statutory scheme leaves no doubt that contributions and reimbursements are simply two alternative means of funding the UC trust fund, with these payments methods being no different, substantively and functionally. The reimbursements are not, as the Third Circuit stated, an alternative to the imposition of liability for a tax, they are simply an alternative way of satisfying that liability. Indeed, in two cases in which this Court construed the liability of certain non-profit entities under the FUTA amendments, it repeatedly described the alternative payment rights accorded to the employers as "taxes," and never even hinted that their status as taxes would depend on which form of compliance the employer elected. *See*, *St. Martin Evangelical*, *supra*, 451 U.S. at 775-777; *Grace Brethern Church*, *supra*, 457 U.S. at 396-98, 411-417.

In sum, prior to the *Suburban II* decision, and its refusal to apply this Court's test without the addition of a host of other factors and policy considerations to limit the granting of tax status, it is unlikely that the Third Circuit would have felt compelled to search, as it did, for reasons to avoid the obvious conclusion that these payments are excise taxes. The majority's conclusion in this case has nullified the State's ability to tax non-profit employers with respect to the individuals in their employ, even though such taxes are expressly permitted by the FUTA. Its decision has defeated the State's statutory intent and purpose of taxing non-profit employers, which the State regards as participants who must bear the costs of funding and

maintaining the UC Fund. The Third Circuit's decision must therefore be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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United States Court of Appeals,
Third Circuit.
In re: UNITED HEALTHCARE SYSTEM, INC., Debtor
The Reconstituted Committee of Unsecured Creditors of the United Healthcare System, Inc., Appellant
v.
State of New Jersey Department of Labor.
No. 03-4768.
Argued Oct. 28, 2004.
Filed Jan. 24, 2005.

Dennis J. O'Grady (argued), J. Alex Kress, Riker, Danzig, Scherer, Hyland & Perretti, Morristown, NJ, for Appellant.
Peter C. Harvey, Attorney General of New Jersey, Patrick DeAlmeida, Assistant Attorney General, Mala S. Narayanan (argued), Deputy Attorney General, Office of Attorney General of New Jersey, Department of Law & Public Safety, Richard J. Hughes Justice Complex, Trenton, NJ, for Appellee.

Before SCIRICA, Chief Judge, FISHER, and GREENBERG, Circuit Judges.

GREENBERG, Circuit Judge.

On this appeal, we must determine whether a non-profit organization's obligation to reimburse the New Jersey Department of Labor ("NJDOL") for unemployment compensation benefits NJDOL paid to its former employees is an "excise tax" under the Bankruptcy Code. United Healthcare System, Inc. ("United") was a non-profit healthcare services corporation that owing to its non-profit status under New Jersey law was permitted to elect to reimburse NJDOL retrospectively for any unemployment compensation benefits NJDOL actually paid to its former employees. United elected to pursue this reimbursement option instead of paying the quarterly unemployment contribution payments New Jersey law requires of most New Jersey employers. Following this election, United filed for bankruptcy. Both before and after United's bankruptcy filing, NJDOL paid unemployment compensation benefits to

former United employees. NJDOL believes that its claim for reimbursement for the benefits it paid is entitled to priority under 11 U.S.C. § 507(a)(8)(E) which grants a priority to claims for excise taxes. The bankruptcy court and the district court agreed with NJDOL. For the reasons we explain below, we conclude that NJDOL's reimbursement claim is not entitled to priority under section 507(a)(8)(E) because the reimbursement obligation is not a tax for bankruptcy purposes under that section. We therefore will reverse.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

There are no relevant facts in dispute on this appeal. United, which operated as the Children's Hospital of New Jersey, provided healthcare services in New Jersey. It obviously had financial difficulties as it filed a bankruptcy petition seeking reorganization under Chapter 11 of the Bankruptcy Code on February 19, 1997, and then on March 8, 1997, terminated the employment of most of its employees. NJDOL processed and, where appropriate, paid the unemployment compensation claims of United's former employees. Because United had elected to reimburse NJDOL for unemployment benefits actually paid rather than to make quarterly contributions to the state unemployment compensation fund, NJDOL sought repayment of the benefits it paid to former United employees. United, however, did not reimburse NJDOL for substantial benefits it paid on United's behalf.

As a part of United's reorganization plan, the appellant, Reconstituted Committee of Unsecured Creditors of United Healthcare System, Inc. ("the Committee"), succeeded to various rights and duties of United. In the bankruptcy proceedings, NJDOL submitted claims for the unemployment benefits it paid to former United employees for which it had not

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[1] In two earlier cases we made determinations arising from United's bankruptcy but neither is related to this case. *In re United Healthcare Sys., Inc.*, 200 F.3d 170 (3d Cir.1999); *In re United Healthcare Sys., Inc.*, 185 F.3d 863 (3d Cir.1999) (table).

been reimbursed. NJDOL sought $941,302.30 (including interest) as reimbursement for unemployment benefits NJDOL paid to United employees whose employment United terminated "pre-petition" (prior to the filing of the bankruptcy petition).[2] NJDOL also sought reimbursement for unemployment compensation benefits it paid to United employees whose employment United terminated after the bankruptcy filing. With interest, this "post-petition" claim amounted to $8,223,160.94.[3] NJDOL sought priority status for both the pre-petition and post-petition claims under section 507(a)(8)(E). The Committee objected to the granting of priority status for these claims, arguing that they should be classified as general unsecured claims.

On December 30, 2002, the bankruptcy court concluded that these pre-petition and post-petition reimbursement claims were entitled to priority as excise taxes under section 507(a)(8)(E).[4] *In re United Healthcare Sys., Inc.*, 282 B.R. 330 (Bankr. D.N.J. 2002). The Committee appealed from this order to the district court which, by an unpublished order on November 13, 2003, affirmed without opinion the bankruptcy court's order. On December 12, 2003, the Committee appealed to this court.

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[2] The addition of other unpaid "pre-petition" obligations brought NJDOL's total pre-petition based claim to $1,156,170.00, but these other pre-petition obligations are not subject to this appeal.

[3] NJDOL also claimed priority status for $79,266.90 resulting from post-petition obligations based on the employment of a few employees after United ceased its operations. The bankruptcy court held that this claim deserved priority status as an administrative expense incurred by the bankruptcy estate, a determination not challenged on this appeal.

[4] The bankruptcy court determined, however, that NJDOL's claim for reimbursement of these payments should not be classified as an employment tax under 11 U.S.C. § 507(a)(8)(D), nor as an administrative expense (except for the $79,266.90 described in *supra* note 3). These determinations are not at issue on this appeal.

II. JURISDICTION AND STANDARD OF REVIEW

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 157(b) and 1334. The district court had appellate jurisdiction pursuant to 28 U.S.C. § 158(a)(1) and we have jurisdiction under 28 U.S.C. §§ 158(d) and 1291. Exercising the same standard of review as the district court, "[w]e review the bankruptcy court's legal determinations *de novo*, its factual findings for clear error and its exercise of discretion for abuse thereof." *In re Trans World Airlines*, Inc., 145 F.3d 124, 130-31 (3d Cir.1998) (citing *In re Engel*, 124 F.3d 567, 571 (3d Cir.1997), and *Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc.*, 57 F.3d 1215, 1223 (3d Cir.1995)). Inasmuch as the parties agree that there are no relevant facts in dispute, our review encompasses only the legal determinations of the bankruptcy court as affirmed by the district court. We will employ a *de novo* review of those legal determinations.

III. DISCUSSION

A. A Non-Profit Employer's Reimbursement Obligation Under New Jersey Law

New Jersey law requires most employers to make quarterly contributions to the state's Unemployment Compensation Fund. N.J. Stat. Ann. § 43:21-7 (West 2004).[5] This standard statutory obligation requires an employer to make quarterly contributions to the fund, regardless of whether the state has paid or will pay unemployment benefits to its former employees. *See id.* We have classified an employer's obligation to make state unemployment compensation contributions as a tax for bankruptcy purposes. *In re Wm. Akers, Jr., Co.*, 121 F.2d 846,

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[5] Section 43:21-7 reads, in relevant part, "[e]mployers other than governmental entities, whose benefit financing provisions are set forth in section 4 of P.L.1971, c. 346 (C. 43:21-7.3), and those nonprofit organizations liable for payment in lieu of contributions on the basis set forth in section 3 of P.L.1971, c. 346 (C. 43:21-7.2), shall pay to the controller for the unemployment compensation fund, contributions...."

851 (3d Cir.1941); *see also Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 402 (3d Cir.1982) (stating that "it cannot be seriously disputed that the unemployment compensation and disability benefits contributions mandated by New Jersey law are 'taxes' within the meaning of the Tax Injunction Act").

Our inquiry, however, does not end with our recognition of the status of unemployment compensation contributions thereby permitting us to affirm the district court's order affirming the bankruptcy court. We cannot do so because, as a non-profit employer, United did not make contributions and thus we are concerned only tangentially with the status of contributions. Instead, as we have indicated it opted, pursuant to N.J. Stat. Ann. § 43:21-7.2 (West 2004), to reimburse NJDOL for any unemployment compensation benefits NJDOL actually paid to former United employees.[6] This provision presents non-profit employers with a choice as it provides that a non-profit employer either "shall pay contributions" to the fund or elect to reimburse NJDOL for benefits actually paid to former employees in lieu of contributions.

This statutorily-provided choice brings New Jersey law in compliance with the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. § 3301 *et. seq.*, which established a federal "excise tax" equal to a certain percentage of the total wages paid by an employer in a calendar year. 26 U.S.C. §

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[6] Section 43:21-7.2 provides, "[n]otwithstanding any other provisions of the Unemployment Compensation Law, for payments of contributions by employers, benefits paid to individuals in the employ of nonprofit organizations ... shall be financed in accordance with the following provisions...." Additionally, N.J. Stat. Ann. § 43:21- 19(f) (West 2004) provides separate definitions for "contributions" and for "payments in lieu of contributions." "Contributions" is defined as "the money payments to the State Unemployment Compensation Fund...." *Id.* "Payments in lieu of contributions" is defined as "the money payments to the State Unemployment Compensation Fund by employers electing or required to make payments in lieu of contributions...." *Id.*

3301. An employer's FUTA obligation is calculated based on "employment," as that term is defined in the Act. Service performed for a non-profit organization classified as such under the federal income taxation statutes is excepted, however, from the term "employment" for federal unemployment tax purposes. 26 U.S.C. § 3306(c)(8).[7] Wages paid for services performed in the employment of a qualifying non-profit organization, therefore, do not give rise to any federal unemployment tax.

In addition to establishing the federal unemployment tax, FUTA governs many aspects of state unemployment compensation systems, including how state unemployment compensation laws treat non-profit organizations. Each state must provide organizations exempted from federal unemployment tax pursuant to 26 U.S.C. § 3306(c)(8) with the opportunity to elect to make reimbursement payments in lieu of contributions. 26 U.S.C. § 3309(a). Accordingly, as we have explained, New Jersey has provided qualifying non-profit organizations with this option.

B. Classification of a New Jersey Non-Profit Employer's Reimbursement Obligation under the Bankruptcy Code

The Bankruptcy Code provides priority status to certain claims. 11 U.S.C. § 507. Unsecured claims of governmental units may be entitled to priority, but only if the statute expressly grants priority to the type of claim asserted. 11 U.S.C. § 507(a)(8) (providing that "[t]he following expenses and claims have priority in the following order: ... (8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--"). Section 507(a)(8)(E) affords priority status to an unsecured claim of a governmental unit to the extent it is for:

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[7] New Jersey law does not except service to a non-profit employer from its definition of "employment." *See* N.J. Stat. Ann. § 43:21- 19(i) (West 2004).

an excise tax on--(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or (ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition.

The bankruptcy court determined, and the district court agreed, that NJDOL's claims for reimbursement of the unemployment benefits it paid to United's former employees are claims for excise taxes afforded priority under section 507(a)(8)(E).

The Committee argues that the bankruptcy court and the district court erred in determining that the reimbursement obligation is an excise tax under section 507(a)(8)(E) because they failed to recognize that federal and New Jersey unemployment compensation laws distinguish between for-profit and non-profit employers and establish different obligations for each. The Committee argues that the obligation reserved for non-profit employers creates a debt obligation, and is not a tax. Conducting its own analysis of the non-profit obligation, the Committee concludes that the non-tax characteristics of the obligation outweigh any of its characteristics suggesting it is a tax. The Committee alternatively argues that if the obligation is a tax for bankruptcy purposes, it is not an excise tax, and even if it is an excise tax, it is not the type of excise tax entitled to priority under section 507(a)(8)(E).

On the other hand, NJDOL contends that the bankruptcy and district courts ruled correctly. Emphasizing the close relationship between reimbursement payments and unemployment compensation contributions, it argues that they are functional equivalents; that the reimbursement option is simply an alternative method to pay a tax. To support this argument, NJDOL points out that if a non-profit employer does not elect the reimbursement alternative, it is liable to make

contributions. NJDOL also argues that because federal unemployment taxes are considered excise taxes, and given the close relationship between federal unemployment taxes and state unemployment taxes, the reimbursement payments also must be excise taxes. In summary, NJDOL concludes that the tax-like characteristics of the reimbursement payments predominate. Responding to the Committee's alternative argument, NJDOL argues that the reimbursement obligation precisely fits into the excise tax category contained in section 507(a)(8)(E).

1. Definition of "Excise Tax" Under the Bankruptcy Code

For us to affirm the order of the district court and thus uphold the reasoning or at least the order of the bankruptcy court, we must agree that the obligation to reimburse NJDOL is characterized properly as an excise tax as that term is used in the Bankruptcy Code. A determination whether the obligation is a tax, excise or otherwise, is implicit in the determination of whether an obligation is an excise tax.[8]

The Bankruptcy Code does not define "tax," "excise" or "excise tax." *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 220, 116 S.Ct. 2106, 2111, 135 L.Ed.2d 506 (1996). Nonetheless when necessary a court determines under federal law whether an obligation is a "tax" for bankruptcy purposes. *City of New York v. Feiring*, 313 U.S. 283, 285, 61 S.Ct. 1028, 1029, 85 L.Ed. 1333 (1941); *State of New Jersey v. Anderson*, 203 U.S. 483, 491-92, 27 S.Ct. 137, 140, 51 L.Ed. 284 (1906). When state law, however, creates the obligation at issue, a court looks to that law to ascertain its attributes so that the court can determine its characterization under federal bankruptcy law. *Feiring*, 313 U.S. at 285, 61 S.Ct. at 1029.

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[8] Because we determine that the reimbursement obligation at issue is not a tax, we need not address the Committee's argument that even if the obligation is a tax, it is not an excise tax or the kind of excise tax entitled to priority.

In *Anderson*, the State of New Jersey sought priority status for payments, alleged to be franchise taxes, owed to the state. Distinguishing between taxes and contractual debts, the Supreme Court determined that "[g]enerally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government." 203 U.S. at 492, 27 S.Ct. at 140. Based on that characterization, the Supreme Court determined that the obligation owed to the state was, in fact, a franchise tax deserving priority. *Id.* at 493, 27 S.Ct. at 140. The Court stated that "this imposition is in no just sense a contract. The amount to be paid, fixed by the statute, is subject to control and change at the will of the state." *Id.* The Supreme Court later relied on the *Anderson* definition of a tax to determine that the obligation to pay sales tax qualified as a tax deserving priority status. *Feiring*, 313 U.S. at 287-88, 61 S.Ct. at 1030-31. The Court determined that "[a] pecuniary burden so laid upon the bankrupt seller for the support of government, and without his consent thus has all the characteristics of a tax entitled to priority." *Id.* at 287, 61 S.Ct. at 1030.

The Court decided *Anderson* and *Feiring* at a time when the priority treatment of government obligations was broader than now under bankruptcy law.[9] Today, a government obligation must fall under one of the specific categories of section 507(a)(8) to receive priority. Since *Anderson* and *Feiring*, courts have attempted to formulate and apply a definition of "tax" that recognizes the precedent of Anderson and Feiring but also accommodates the evolution of the law governing priority of government obligations.

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[9] In *Anderson*, the Court explained that the version of the Bankruptcy Act in operation granted priority status to "all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality." *Anderson*, 203 U.S. at 487-88, 27 S.Ct. at 138. The Supreme Court decided *Feiring* during the operation of the Bankruptcy Act as amended in 1938. At that time, the Act awarded priority status to "taxes legally and owing by the bankrupt to the United States or any State or any subdivision thereof." *Feiring*, 313 U.S. at 285, 61 S.Ct. at 1029.

The bankruptcy court applied the tests resulting from what we believe are the three most frequently cited courts of appeals decisions to have engaged in this process, *In re Lorber Industries of California, Inc.*, 675 F.2d 1062 (9th Cir.1982), *In re Suburban Motor Freight, Inc.*, 998 F.2d 338 (6th Cir.1993) ("*Suburban I*"), and *In re Suburban Motor Freight, Inc.*, 36 F.3d 484 (6th Cir.1994) ("*Suburban II*"). In *Lorber*, the Court of Appeals for the Ninth Circuit faced the issue whether sewer use fees constituted taxes entitled to priority. Building on the "pecuniary burden laid upon individuals or property for the purpose of supporting the government" standard the Supreme Court established in Anderson, the court developed a four-part test to determine whether an obligation is a tax for bankruptcy purposes: (1) "an involuntary pecuniary burden, regardless of name, laid upon individuals or property"; (2) "imposed by, or under authority of the legislature"; (3) "for public purposes, including the purposes of defraying expenses of government or undertakings authorized by it"; (4) "under the police or taxing power of the state." *Lorber*, 675 F.2d at 1066 (quoting *Dungan v. Dep't of Agric., State of California*, 332 F.2d 793 (9th Cir.1964)). When the court applied this test to the sewer use fees at issue, it determined they were more like non-tax fees or a contractual debt than a tax. *Lorber*, 675 F.2d at 1067. The court observed that the use fees were assessed proportionately to use, and concluded that because the charges resulted from the voluntary act of producing wastewater for disposal, they were classified better as debt.[10] *Id.* The court determined that its characterization of the use fees as contractual debt was consistent with the history and purpose of the bankruptcy laws, which had narrowed the reach of the priority tax category over time. *Id.* at 1067- 68.

In *Suburban I* the Court of Appeals for the Sixth Circuit was dissatisfied with the four-part *Lorber* test and sought to

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[10] It must be acknowledged that much the same thing could be said about sales taxes as the greater the purchases of taxable items or services the greater the tax owed.

narrow its reach. The court found the *Lorber* test to be overly broad, determining that its factors did not significantly narrow the pool of government obligations that could be characterized as taxes. Concerned that courts were relying too heavily on the "public purpose" *Lorber* factor, the court observed that if that factor is determinative, all money collected by the government would qualify as a "tax" because all money collected by the government is used for public purposes in some way. *Suburban I*, 998 F.2d at 341. The court commented that "[t]he threat of the *Lorber* reasoning ... is that the Government automatically wins priority for all money any debtor owes it, regardless of the nature of the payments." *Id.* Such an advantage could "eliminate all distinction between 'taxes' and 'fees'" and would allow the government to "prevail consistently against private creditors with arguably equal claims."[11] *Id.* To address its concern that the *Lorber* test is overly broad, in *Suburban II* the court added two factors to the *Lorber* analysis: (1) whether the obligation is "universally applicable to similarly situated entities"; and (2) whether granting priority status to the government will "disadvantage private creditors with like claims." *Suburban II*, 36 F.3d at 488-89.

In *Suburban I*, the court determined that premium payments to Ohio's workers' compensation fund are taxes. After observing that the state law demanded compulsory payments and did not allow employers to purchase private insurance,[12] the court concluded that the additional factors it set forth to determine if an obligation is a tax had been satisfied and that the obligation in question was a tax for bankruptcy purposes. *Suburban I*, 998 F.2d at 342. The court stated, "[i]f the State had an optional participation program, or allowed employers to purchase private liability insurance, it would be unfair and without statutory justification to call state-collected premiums 'taxes' and put the [state] ahead in line while leaving unpaid

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[11] Ironically, the government had lost in *Lorber*.

[12] Ohio law did permit employers to self-insure. *Suburban I*, 998 F.2d at 341.

private insurers to languish along with the rest of the unsecured creditors."[13] *Id.*

In *Suburban II*, the obligation before the court was money owed to the Ohio Bureau of Workers' Compensation for payments the Bureau made to workers' compensation claimants. *Suburban II*, 36 F.3d at 486. These reimbursement payments were due to the Bureau because the employer failed to pay premiums and also failed to pay claims while it was self-insured. *Id.* The court refused to extend its holding in Suburban I, which afforded priority status to claims for unpaid premiums, to the obligation in *Suburban II*, which involved reimbursement claims. *Id.* at 487-88. After applying the *Lorber* test and the two additional factors derived from *Suburban I*, the court determined that because the employer's liability resulted solely from its default, the obligation failed the universality test of *Suburban I*. *Id.* at 489. Moreover, the court believed that classifying the obligation as a priority claim would disadvantage private creditors with like claims. *Id.*

The Supreme Court has considered whether an obligation is a tax in contexts other than bankruptcy. For example, the Court considered the nature of an obligation owed to a federal agency to allow it to recoup the cost of regulating a particular industry or activity. *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974). As the Court explained, the legislative power in

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[13] The Court of Appeals for the Fourth Circuit's opinion in *New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund*, 886 F.2d 714 (4th Cir.1989), influenced the court in *Suburban I*. The Court of Appeals for the Sixth Circuit elected to follow the "relatively balanced approach" of *New Neighborhoods*. *Suburban I*, 998 F.2d at 341. In *New Neighborhoods*, the court determined that contributions to West Virginia's workers' compensation scheme are taxes. *New Neighborhoods*, 886 F.2d at 720. In reaching this conclusion, the court analyzed the nature of the obligation, considered its insurance-like characteristics, and also recognized that the bankruptcy laws limit the availability of priority claims.

enacting a tax may "disregard benefits bestowed by the Government on a taxpayer." *Id.* at 340, 94 S.Ct. at 1149. But a situation in which a "public agency may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society" is different. *Id.* at 340-41, 94 S.Ct. at 1149. *See also In re Wm. Akers, Jr., Co.*, 121 F.2d at 850 (quoting with approval language explaining that taxes cannot be required to benefit taxpayers proportionately to their tax payments). Additionally, the government's ability to manipulate the assessment to encourage or discourage a certain activity is a characteristic of a tax. *National Cable*, 415 U.S. at 341, 94 S.Ct. at 1149.

Returning to the bankruptcy context, the Supreme Court, after *Lorber* and *Suburban*, again addressed the question of whether an obligation is a tax for bankruptcy purposes. In *CF & I Fabricators*, the Court considered whether a federally mandated payment equal to 10 percent of a pension plan funding delinquency is an excise tax under the bankruptcy laws.[14] *CF & I Fabricators*, 518 U.S. at 215, 116 S.Ct. at 2109. In reviewing *Anderson*, *Feiring* and other precedent addressing whether a particular obligation is a tax, but without commenting on the reasoning of *Lorber* or *Suburban*, the Court remarked that "in every one of those cases the Court looked behind the label placed on the exaction and rested its answer directly on the operation of the provision using the term in question." *Id.* at 220, 116 S.Ct. at 2111. Additionally, the Court observed that "[i]n each instance the decision turned on the actual effects of the exactions." *Id.* at 221, 116 S.Ct. at 2111. The Court recognized that it decided *Anderson* and *Feiring* before enactment of the 1978 Bankruptcy Code, but concluded

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[14] *CF & I Fabricators* arose under the pre-1994 Bankruptcy Code. Under that prior version of the Code, Congress granted excise taxes seventh priority under section 507. In 1994, Congress moved the provision to eighth priority, but did not alter the language of the provision. *CF & I Fabricators*, 518 U.S. at 216 n.1, 116 S.Ct. at 2109 n.1.

that Congress did not reject the *Anderson-Feiring* reasoning in enacting the 1978 Code.[15] *Id.* at 224, 116 S.Ct. at 2113. Therefore, the Court proceeded to undertake a "functional examination" of the obligation at issue and concluded that its "obviously penal character" signaled that it was a penalty, and not a tax. *Id.* at 225, 116 S.Ct. at 2113-14.

We, of course, will follow the lead of the Supreme Court and accordingly will make a functional examination of the obligation at issue here that focuses on actual effects and looks behind labels while recognizing the precedent of *Anderson* and *Feiring*.[16] While the *Lorber-Suburban* analysis is helpful in executing this examination, we do not believe that its six factors should constrain our inquiry. We believe a functional examination that balances the characteristics of the obligation at issue will signal whether an obligation is a tax for bankruptcy purposes, and that an examination should be flexible enough to allow for consideration of any relevant

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[15] The Court recognized a "statement from the legislative history of the 1978 Act that '[a]ll Federal, State or local taxes generally considered or expressly treated as excise taxes are covered' by § 507(a)(7)(E)." The Court also recognized, however, that the obligation that was before it was not expressly called an excise tax and that whether the obligation is considered generally to be an excise tax was precisely the question before the Court. *CF & I Fabricators*, 518 U.S. at 223-24, 116 S.Ct. at 2112-13.

[16] Chief Judge Scirica in his dissenting opinion agrees that this functional examination is the appropriate analysis to employ to determine whether the reimbursement obligation is a tax for bankruptcy purposes. He focuses his functional examination, however, on whether the reimbursement obligation falls into one of four rigid categories: tax; debt; fee in exchange for a benefit; or a penalty. We believe that a broader, more fluid approach is necessary to conduct a true functional analysis. Our task is not to test whether the reimbursement obligation fits into one of those four categories precisely, though we do characterize the obligation as a debt, but to look behind labels and to examine the operation of the statutory scheme.

factor. The problem with applying only the *Lorber-Suburban* six-factor test is that it may prove too rigid to provide an effective analysis of every potential obligation and thus could preclude consideration of important characteristics. Also, by employing a functional examination we preempt the concern that the Court of Appeals for the Sixth Circuit expressed that the *Lorber* test produces overly broad classification of claims as taxes. Moreover, our more flexible approach allows us to consider the characteristics of the obligation in light of the evolving treatment of priority claims under the Bankruptcy Code. We emphasize, however, that the *Lorber* and *Suburban* factors are helpful in undertaking this functional examination, and at times application of those factors alone sufficiently may answer the question whether a governmental obligation is a tax.

2. The Analysis of the Bankruptcy Court Regarding the Classification of a New Jersey Non-Profit Employer's Reimbursement Obligation under the Bankruptcy Code.

The bankruptcy court applied the *Lorber-Suburban* factors to the reimbursement obligation option and concluded that it satisfied all six factors. The court stated, "[b]ecause United could not escape its statutory obligation to make payments to the Unemployment Compensation Fund, it was subject to an involuntary pecuniary burden imposed by the legislature as described in the *Lorber* test. United was only able to choose how to make the payments, not whether to make the payments." 282 B.R. at 337. The court determined with regard to the public purpose *Lorber* factor, that New Jersey enacted the unemployment compensation law for a public purpose because the fund arrangement protects the public against the evils associated with unemployment. The bankruptcy court further determined that the *Suburban* factors were met. The "universally applicable" factor was met because "New Jersey [law] requires all employers to make payments to the unemployment compensation fund." *Id.* at 338. The bankruptcy court also determined that there were no private creditors with like claims because the unemployment compensation law does

not "permit" employers to obtain private insurance to satisfy their obligations.[17] *Id.*

The bankruptcy court recognized that the Court of Appeals for the First Circuit directly had addressed whether a non-profit employer's obligation to reimburse a state unemployment compensation fund amounted to an excise tax for bankruptcy purposes in *In re Boston Regional Medical Center, Inc.*, 291 F.3d 111 (1st Cir.2002) ("*Boston Regional I*"). In that case, the court reached a result opposite of that of the bankruptcy court here,[18] concluding that a non-profit employer's choice to make payments in lieu of contributions creates a kind of obligation different than a tax. The court illuminated a distinction between the obligation to make quarterly contributions and the obligation to reimburse for benefits actually paid. Employers reimbursing the state are not "sustain[ing] a government undertaking as a whole," but instead only are compensating the state for the cost that particular employer caused the state to incur.[19] *Id.* at 122.

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[17] The bankruptcy court used the word "permit." Perhaps the word "authorize" might have been better as it is possible that outside of the aegis of the unemployment compensation laws a private insurance company could insure a non-profit employer for losses attributable to its reimbursement obligations. We hasten to add, however, that we do not predicate our result on this probably theoretical possibility.

[18] The Court of Appeals for the First Circuit considered the Massachusetts statute creating the commonwealth's reimbursement option. We note that Chief Judge Scirica cites *Boston Regional I* in his dissent but does not attempt to distinguish that case which is inconsistent with his result.

[19] In a later decision involving the same debtor, the same court determined that mandatory payments to Massachusetts' Uncompensated Care Pool are taxes for bankruptcy purposes. *In re Boston Regional Medical Ctr., Inc.*, 365 F.3d 51 (1st Cir.2004) ("*Boston Regional II*"). The court distinguished the payments to the Uncompensated Care Pool from the unemployment compensation reimbursement payments because the former are "geared to sustain, as a whole, the stated governmental

According to the bankruptcy court, this distinction did not cause the reimbursement obligation to fail the *Lorber-Suburban* test. The bankruptcy court stated, "[t]he fact that employers paying contributions absorb a greater share of the cost, does not mean that payments in lieu of contributions are not universal, and therefore not taxes. The payment burden of many tax statutes falls unevenly on taxpayers." 282 B.R. at 338. Also, the bankruptcy court disagreed with the Court of Appeals for the First Circuit's conclusion that the legislative history of FUTA supported a conclusion that the reimbursement obligation is not a tax.

In *Boston Regional I*, the court of appeals acknowledged that a reasonable argument could be made that payments in lieu of contributions could be called taxes. *Boston Regional I*, 291 F.3d at 121-22. What "tip[ped] the scales" for the court was the commonwealth's ability to require a non-contributory employer to post a bond to secure payments required by it. *Id.* at 122. Because the commonwealth did not require a bond of the non-profit employer, the court determined that the commonwealth, and not the class of general unsecured creditors, should endure the result of its decision to risk that benefits would not be repaid. *Id.* at 123. The ability to require a bond made the commonwealth something more than an involuntary creditor, thus undermining a traditional policy reason behind affording priority status to governmental obligations. *Id.* at 122-23. In this case, the bankruptcy court acknowledged that New Jersey law permits NJDOL to require a bond, and that if a bond were required, "a surety with the same claim as the government could be disadvantaged if the government claim received priority," but concluded that the tax-like characteristics of the reimbursement obligation outweighed this one non-tax-like characteristic. 282 B.R. at 340-41.

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undertaking of providing access to health care for low-income uninsured and under-insured residents." *Id.* at 61.

In its decision, the bankruptcy court relied on the district court's opinion in *In re Sacred Heart Hospital of Norristown*, 209 B.R. 650 (E.D. Pa.1997). In that case, the district court, after applying the *Lorber -Suburban* factors, concluded that a non-profit employer's obligation to reimburse the Pennsylvania Unemployment Compensation Fund is an excise tax entitled to priority. *Id.* at 658. The district court stated: "Payments in lieu of contributions are excise taxes and entitled to priority in bankruptcy. First, without a doubt the payments are 'involuntary.' See 43 P.S. § 781(a)(1) ('[e]ach employer shall pay contributions ...') ... Simply stated, all employers-for-profit and nonprofit-must pay them." *Id.* at 656. The district court reasoned in *Sacred Heart* that the reimbursement payments benefit the public because the provision of unemployment compensation benefits protects all taxpayers from demands that unemployed persons otherwise would make on the welfare system. *Id.* at 656. The district court also held, "the law satisfies the two 'public purpose' factors articulated by the Sixth Circuit in *Suburban II*. The obligation is universally imposed on all employers.... Further, ... there are no private creditors with claims sufficiently similar to violate the bankruptcy policy of equal distribution."[20] *Id.* at 656.

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[20] The district court in *In re Sacred Heart* distinguished unemployment reimbursement obligations from workers' compensation premiums in its analysis. *In re Sacred Heart*, 209 B.R. at 657-58. The district court discussed a line of cases holding that worker's compensation premiums are not taxes where the state law at issue provided employers with the option to subscribe to a state fund, to obtain private insurance, or to self-insure. *Id.* The reasoning behind this line of cases is that where a state does not monopolize coverage, the state looks more like just another private participant and less like a taxing authority. *Id.* The district court observed that the Commonwealth of Pennsylvania "monopolizes" the unemployment compensation system because employers do not have a private insurance or self-insurance option. *Id.* While this observation may be correct, and may support the conclusion that unemployment compensation contributions are taxes, it does not speak to the heart of the matter before us, the nature of the function or effect of the reimbursement obligation.

3. Functional Examination of a New Jersey Non-Profit Employer's Reimbursement Obligation

After making an independent analysis predicated on a functional examination such as that applied in *CF & I Fabricators*, we have determined that United's obligation to reimburse NJDOL for unemployment compensation benefits is not a tax for bankruptcy purposes. We acknowledge that this case is close, given that reimbursement payments and quarterly contributions are complementary. But the fact remains that while reimbursement payments are related to unemployment compensation contributions, they are not the same obligation. Though we characterized the contribution obligation as a tax in *In re Wm. Akers, Jr., Co.*, United's duty to reimburse NJDOL is a different kind of obligation as it is better characterized, in view of its direct correlation to payments NJDOL made by reason of United having terminated employees, as an alternative to paying taxes rather than as an alternative method to pay a tax.

While we agree with the conclusion of the Court of Appeals for the First Circuit that a non-profit employer's reimbursement obligation is not a tax, we support our conclusion with different emphasis. We do not believe that NJDOL's ability to require a bond to secure an employer's payment dictates a conclusion that this obligation is not a tax.[21]

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[21] The Court of Appeals for the First Circuit noted, "[w]e do not hold that the availability of a surety bond, as in this case, would alone be sufficient to render an obligation not a tax," but that combined with the other reasons before the court, the bond issue was the "decisive factor." *Boston Regional I*, 291 F.3d at 123 n.14. The New Jersey statute also provides that the state may require a bond. N.J. Stat. Ann. § 43:21-7.2(h) (West 2004). This circumstance is not determinative, however, because the state in general may require a bond for the payment of a state tax. *See* N.J. Stat. Ann. § 54:49-2 (West 2002).

Instead, we believe that a broader examination of the nature of the reimbursement obligation reveals its non-tax character.

We question the district court's treatment in *Sacred Heart* of contributions and reimbursement payments as similar for bankruptcy purposes under the Pennsylvania statute. *See In Re Sacred Heart*, 209 B.R. at 656. More to the point, we conclude that under the New Jersey statute at issue here contributions and reimbursement payments are distinct obligations. According to the New Jersey statute establishing the contribution obligation, "*[e]mployers other than* governmental entities, whose benefit financing provisions are set forth in section 4 of P.L.1971, c. 346 (C. 43:21-7.3), *and those nonprofit organizations liable for payment in lieu of contributions* on the basis set forth in section 3 of P.L.1971, c. 346 (C. 43:21-7.2), *shall pay* to the controller for the Unemployment Compensation Fund, *contributions* ...." N.J. Stat. Ann. § 43:21-7 (emphasis added). Section 43:21-7.2 provides, "[n]otwithstanding any other provisions of the Unemployment Compensation Law, for payments of contributions by employers, benefits paid to individuals in the employ of nonprofit organizations ... shall be financed in accordance with the following provisions...." Additionally, N.J. Stat. Ann. § 43:21-19(f) (West 2004) provides separate definitions for "contributions" and for "payments in lieu of contributions."

The language of sections 43:21-7.2 and 43:21-19(f) evidences that, even though under New Jersey law service to a non-profit employer is not excepted from the definition of "employment," *see* N.J. Stat. Ann. § 43:21- 19(i) (West 2004), the statute does except non-profit employers engaging in "employment" from the contribution obligation section 43:21-7 creates. Instead, section 43:21-7.2 contains a different kind of obligation for those non-profit employers. The bankruptcy court determined that under the above statutes, all New Jersey employers must "make payments." 282 B.R. at 338. That may

be true, but the key here is that contributory payments are a different obligation than reimbursement payments.[22]

Having concluded that contributions and reimbursement payments are different obligations, we next consider the nature of the reimbursement obligation. One major characteristic of the reimbursement obligation is that payments in lieu of contributions reimburse NJDOL for unemployment benefits actually paid and do not raise funds to support a general governmental undertaking.[23] In contrast, quarterly contribution payments do support a general governmental undertaking. An employer paying the quarterly contribution tax is helping to create a fund from which NJDOL appropriately pays benefits. A contributory employer is obligated to contribute even if it does not actually use the government program, here unemployment compensation benefits paid to former employees. A payment in lieu employer, however, only reimburses NJDOL for payments NJDOL has made to its former employees.

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[22] The legislative history of section 43:21-7.2 and of FUTA support our conclusion that the New Jersey statute creates two different obligations. According to the Senate Report accompanying FUTA, "[s]tate programs would be required to permit nonprofit organizations the option of reimbursing the state for unemployment compensation payments attributable to service for them rather than paying regular state unemployment compensation taxes." S.Rep. No. 91-752, 1970 U.S.C.C.A.N. 3606, 3609. Similarly, the sponsor statement to the bill that created the non-profit reimbursement obligation in New Jersey states, "the nonprofit organizations are afforded a choice to either elect to pay contributions or to make reimbursement to the fund for benefits paid." Sponsor Statement, N.J. Stat. Ann. § 43:21-7.2, Laws of 1971, Ch. 346, Bill No. A2501 (1971).

[23] The reimbursement payments arguably are used for a government-sponsored purpose. If, however, the standard is whether monies collected are used for any government-sponsored purpose, it is hard to imagine any claim held by a government that would not qualify as a tax.

We disagree with the bankruptcy court that this distinction is immaterial; in fact, this distinction is crucial in unveiling the operation and actual effect of the reimbursement obligation. The bankruptcy court's focus on its observation that "[t]he payment burden of many tax statutes falls unevenly on taxpayers" is misplaced. 282 B.R. at 338. The issue is not whether some taxpayers pay more or less, but rather whether an entity is paying taxes or incurring some other type of obligation. Again, the relevant distinction is not whether some pay more or less, but whether some are paying to sustain a general governmental undertaking while others only are reimbursing the system for exactly the benefits paid to their former employees.[24]

Thus, rather than a tax, the reimbursement obligation is more like a promise in exchange for the privilege of employing individuals in the state without being required to pay state unemployment compensation contributions. The state will allow a non-profit employer to conduct business without making contributions to the state unemployment compensation fund, and the state will pay the unemployment compensation benefits due to the non-profit employer's former employees, but this creates a debt, and the state insists on being repaid.

NJDOL's observation that if the reimbursement option is not selected, a non-profit employer must make contributions does not undermine this point. Rather than address the nature of the reimbursement payments, this argument only highlights the statutory scheme granting non-profit employers with a choice unavailable to other employers. We similarly reject NJDOL's argument that because federal unemployment taxes are considered excise taxes, and given the close relationship between federal unemployment taxes and state unemployment

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[24] Even if, as explained by NJDOL, contributions and reimbursements once paid are intermingled in the same state fund, that fact does not negate the reality that employers electing to make reimbursement payments pay only for the benefits disbursed from the fund by reason of their termination of employees.

taxes, the reimbursement payments also must be excise taxes. The role of FUTA as germane to our inquiry is limited to its mandate that states must provide non-profit employers with a reimbursement obligation option. That mandate still leaves open the question surrounding the nature of this obligation.

While *National Cable* was decided in a different context, its reasoning is transferable, and it further illuminates the non-tax character of the reimbursement obligation. *See, e.g., In re Jenny Lynn Mining Co.*, 780 F.2d 585 (6th Cir.1986) (applying reasoning of *National Cable* to determine whether strip mining permit obligation is an excise tax entitled to bankruptcy priority); *In re Trism, Inc.*, 311 B.R. 509 (8th Cir. B.A.P. 2004) (borrowing reasoning of *National Cable* to determine whether a highway user fee is an excise tax entitled to priority). In *National Cable*, the Supreme Court pointed out that a "disregard [of] benefits bestowed by the Government on a taxpayer" is indicative of a tax. *National Cable*, 415 U.S. at 340, 94 S.Ct. at 1149. The government's ability to manipulate the assessment also is characteristic of a tax. *Id.* at 341, 94 S.Ct. at 1149. In contrast, a situation in which a payment is exchanged for a government benefit not shared by others indicates that the debt is not for a tax. *Id.* at 340-41, 94 S.Ct. at 1149.

NJDOL, in demanding reimbursement, may not disregard the benefits it bestowed. In fact, the reimbursement obligation directly is linked to the benefits it paid. Non-profit employers enjoy a benefit not shared by other employers, as they may operate in the state without making quarterly contributions to the state unemployment compensation fund. Additionally, the state cannot manipulate a reimbursement obligation to encourage or discourage certain activity. Again, under the reimbursement program, the government pays out benefits, and the non-profit employer simply refills the government's coffers.

Contribution and reimbursement payments are distinct obligations with different sets of accompanying rules. They do not create one obligation that is applied to all New Jersey

employers. Reimbursement payments are made in lieu of, or instead of, contributions. Reimbursement payments thus are something different than contributions, and the issue is whether those payments are excise taxes. Our functional examination reveals that reimbursement payments are not taxes, and therefore cannot be classified as excise taxes entitled to priority under section 507(a)(8)(E).

IV. CONCLUSION

For the reasons stated above, the order of the district court of November 13, 2003, will be reversed and the case will be remanded to that court, which in turn shall remand the matter to the bankruptcy court to reverse its order granting NJDOL's claim priority and for further proceedings consistent with this opinion.

SCIRICA, Chief Judge, dissenting.

In this difficult and close case, I respectfully dissent. At issue is whether the New Jersey Department of Labor's ("NJDOL") claim seeks recovery of an excise tax that would entitle it to bankruptcy priority under 11 U.S.C. § 507(a)(8)(E).

New Jersey's unemployment compensation fund is a general social welfare program paid for by contributions from both for-profit and non-profit employers. Like the for-profit employer, the non-profit employer's required contribution funds the New Jersey statute's objective--to ameliorate "economic insecurity due to unemployment." N.J.S.A. § 43:21-2. For this reason, the non-profit employer's contribution more closely resembles a tax than other kinds of government assessments, such as debt obligations, fees in exchange for benefits, or penalties. In my view, the distinction between the contributory payment and the reimbursement obligation is one of degree rather than kind. Because both forms of unemployment contribution constitute a tax for bankruptcy purposes, I would affirm the judgment of the District Court.

I

In *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, the Supreme Court conducted a "functional examination" to determine whether the levy in question was entitled to bankruptcy priority because it more closely resembled a tax than another form of government assessment. 518 U.S. 213, 224-25, 116 S.Ct. 2106, 135 L.Ed.2d 506 (1996). In my view, the question is whether the non-profit employer's reimbursement obligation here functions more like a tax than another kind of assessment, such as a debt, a fee in exchange for a benefit, or a penalty.

A. Debt obligation

The Supreme Court has distinguished tax obligations from ordinary debt because unlike debt, taxes are involuntary. *N.J. v. Anderson*, 203 U.S. 483, 492, 27 S.Ct. 137, 51 L.Ed. 284 (1906); *See also In re Boston Reg'l Med. Ctr., Inc.*, 291 F.3d 111, 120 (1st Cir. 2002) (citing *Anderson*, 203 U.S. at 492, 27 S.Ct. 137). The non-profit employer's reimbursement obligation here lacks the distinguishing characteristics of debt. It is not a voluntary obligation, nor is it based on express or implied contract.[25] Rather it is mandated by statute.[26] The

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[25] The majority holds the reimbursement obligation more closely resembles a debt, likening the non-profit's obligation to a "promise in exchange for the privilege of employing individuals in the state without being required to pay state unemployment compensation contributions." While this is plausible, I believe these are the very characteristics of debt that the reimbursement obligation lacks--it is not made voluntarily nor is it pursuant to a contractual agreement.

[26] Before 1970, non-profit organizations did not pay the unemployment compensation tax or contribute to state unemployment compensation funds. 26 U.S.C. § 3306(c)(8) excluded from "covered" employment "service performed in the employ of a religious, charitable, educational, or other [tax exempt] organization." *See* Pub.L. 86-778, § 533, 74 Stat. 984; *Cal. v. Grace Brethren Church*, 457 U.S. 393, 398 n. 6, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982). Congress amended FUTA in

1970 FUTA amendment required formerly excluded non-profit employers to pay the contributory tax or to make reimbursement payments in its place. Although not identical in form, the 1970 FUTA amendment imposed on non-profit employers a burden similar to that imposed on for-profit employers--an obligation to fund New Jersey's unemployment payments furthering the goals of the unemployment compensation regime.

B. Fee in Exchange for a Benefit

The non-profit employer's reimbursement obligation functions more like a tax than a fee in exchange for a benefit. The Supreme Court has distinguished tax obligations from government fees in exchange for benefits or for services rendered. *See Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340-42, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974); *see also County Sanitation District No. 2 of Los Angeles County v. Lorber Indus. of Cal.* (*In re Lorber*), 675 F.2d 1062 (9th Cir.1982) (holding that sewer and water user fees imposed for voluntary use of system are not taxes); *In re Adams*, 40 B.R. 545, 548 (E.D.Pa.1984) ("The 'inherent character' of the charges are premised upon an implied agreement to pay for the water and sewer services furnished.").

1970, requiring state unemployment plans to cover employees of non-profit organizations and obligating non-profit employers to contribute to the state unemployment compensation fund. *See* 26 U.S.C. § 3309(a)(1). The 1970 amendment extended state participation to non-profit organizations because it recognized that "unemployment affects a substantial number of their employees[.]" S.Rep. No. 91-752, at 48-49, *reprinted in* 1970 U.S.C.C.A.N. 3606, 3617-18 (1970). But at the same time, the federal scheme sought to minimize the cost to the non-profit employer, limiting its obligation to the actual amount that former employees cost the unemployment compensation fund. *See id.* ("These [non-profit] organizations, which are often dependent upon charitable contributions, should not be required to share in the costs of providing benefits to workers in profit-making enterprises.").

National Cable held that costs imposed by the Federal Communications Commission ("FCC") on certain broadcasters to cover the expenses of FCC oversight did not constitute a tax. The Court's distinction between tax and fee rested on whether the obligation imposed on the regulated entity supported the FCC's function "to safeguard the public interest in the broadcasting activities of members of the industry" or supported a "benefit" of "value to the recipient." *National Cable*, 415 U.S. at 341-42, 94 S.Ct. 1146. The Court found the predominant feature of the imposed cost was to benefit the broadcasters, not the public--hence it was a fee, not a tax.[27] There were three major factors that informed the holding in *National Cable*: (1) whether payment of the assessment is voluntary, that is, whether it could be avoided by not taking advantage of the government service, *id.* at 340, 94 S.Ct. 1146; (2) whether the government assessment is in exchange for a specific government service that benefits the entity paying in a manner "not shared by other members of society," *id.* at 341, 94 S.Ct. 1146; and (3) whether the government assessment is collected to compensate the government for the expense of providing the service to the entity, but not to raise revenues to cover the cost of providing the service for others. *Id.* at 341-42, 94 S.Ct. 1146.

In my view, only the last consideration favors reversal here. As the majority notes, the reimbursement obligation does not support the costs of other employers' former workers or of administering the unemployment compensation fund. Instead, a non-profit employer only reimburses the state for the costs

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[27] FCC oversight benefitted the cable operators by, for example, enabling them to broadcast without interference. *National Cable*, 415 U.S. at 343, 94 S.Ct. 1146. In addition, the Court remanded for a recalculation of the fee because it determined that the fees imposed by the FCC were too broadly calculated. *Id.* The FCC had imposed all of the costs of regulating cable television systems to the industry and none to the general public. *Id.* at 341-42, 94 S.Ct. 1146. As a result, the fee schedule in question resembled a tax because the value of the fee was greater than the service provided to the recipient. *Id.*

imposed by its own former employees. Nevertheless the statutory purpose of the obligation is to benefit the former employees and the public good, not the employer.

Moreover, application of the first and second factors supports the view that this reimbursement obligation is a tax.[28] Considering the first factor, there is no voluntary act here. National Cable stated that a fee (as opposed to a tax) "is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." *Id.* at 340, 94 S.Ct. 1146. If the non-profit employer does not elect to reimburse, then it must contribute in the same manner as a for-profit employer. That is, the non-profit employer either pays the contributory tax or elects to make payments in lieu of the tax, but it cannot evade its responsibility to the unemployment compensation fund altogether. The non-profit employer is not a voluntary "applicant" for "benefits," but rather, a required participant in the unemployment compensation program.

Considering the second factor, the non-profit employer does not enjoy a "benefit" that is "not shared by other members of society." In this case, the most direct "recipient of the benefit" is the former employee that receives payments from the unemployment compensation fund. These payments also benefit the public interest, helping to reduce the strain on society that unemployment would otherwise cause. But the payments do not grant an affirmative benefit on the non-profit

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[28] *In re Sacred Heart Hosp. of Norristown* held that reimbursement obligations to the Pennsylvania unemployment compensation fund constituted a tax entitled to priority for bankruptcy purposes. 209 B.R. 650 (E.D. Pa. 1997). After considering who benefits from the reimbursement obligation and whether it is voluntary, the court concluded that "the payments are used to benefit the public generally because compensating unemployed workers reduces the chances of their becoming poor and making demands on the federal and state welfare systems and thus all taxpayers" and that the reimbursement obligation is "without a doubt ...'involuntary.'" *Id.* at 656.

employer. In *National Cable*, by contrast, the broadcasters' fees benefitted themselves, at least in part, by paying for the administrative cost of FCC oversight.

It would be inaccurate to characterize the "benefit" of the reimbursement obligation as the ability to operate in New Jersey without having to pay the contributory tax. Such a characterization differs from the fee-for-benefit scheme in National Cable, where cable broadcasters paid a fee in exchange for the benefits of FCC oversight. In *National Cable* the Supreme Court cited as an example of a fee-for-benefit, "a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." *Id.* at 340, 94 S.Ct. 1146. But here, it is difficult to conceptualize the reimbursement obligation as a license, permit, or operating fee.[29]] In short, the paradigm fee in exchange for a benefit, under *National Cable*, is an applicant that pays in exchange for administrative oversight or for a license to engage in a certain business activity. An unemployment reimbursement obligation--which supports a general social welfare program--does not comfortably fit into that model.

The majority views this differently, holding that the non-profit employer enjoys the "benefit" that it "may operate in the state without making quarterly contributions to the state unemployment compensation fund." Nonetheless, before 1970, non-profit employers had no obligation to the unemployment compensation fund at all. I find more persuasive the view that, instead of bestowing a benefit, the 1970 FUTA amendment imposed on non-profit employers a new burden to support the unemployment compensation fund, with the option to pay the quarterly tax or reimburse the state for costs.

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[29] The differences between *In re Jenny Lynn Mining Co.*, 780 F.2d 585 (6th Cir.1986), and this case are instructive. Unlike the reimbursement obligation here, the government assessment in *In re Jenny Lynn Mining Co.* directly benefitted the applicant by licensing it to engage in operating a strip mine.

C. Penalty

The reimbursement obligation functions more like a tax than a penalty. The Supreme Court distinguished taxes from penalties on the basis that a tax supports government policies while a penalty punishes unlawful activity. *Reorganized CF & I Fabricators*, 518 U.S. at 224, 116 S.Ct. 2106. The non-profit employer's reimbursement obligation is clearly not a penalty on unlawful activity. It is a burden imposed on non-profit entities lawfully engaged in employment.[30]

If the reimbursement obligation is not entitled to priority in bankruptcy proceedings, NJDOL may well require a bond from non-profit employers. Requiring a bond works against FUTA's stated objective to minimize the cost of non-profit organizations' participation in the unemployment compensation scheme.

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[30] It bears noting that failure to give the reimbursement obligation priority in bankruptcy will likely increase non-profit employers' operating costs--a result contrary to the federal and state legislative objectives. *See* S.Rep. No. 91-752, at 48-49, *reprinted in* 1970 U.S.C.C.A.N. 3606, 3617-18 (1970) (stating intent to minimize cost to non-profit organizations because they "are often dependent upon charitable contributions"). NJDOL may require from non-profit organizations "a bond or other security ... for the payment of any taxes, interest, and penalties imposed pursuant to any state tax law[.]" N.J.S.A. 54:49-2. This allows New Jersey to shield itself, in advance, from an unpaid reimbursement obligation. Generally, not requiring a bond lowers the costs to non-profit employers of doing business in New Jersey. Allowing payments in lieu of the contributory tax and not requiring a bond both reduce the cost of non-profit employers' obligations. *See* Amy L. Henrich, *Preferential Treatment of Charities Under the Unemployment Insurance Laws*, 94 *Yale L.J.* 1472, 1478 n.35 (1985) ("The present value of a future debt obligation decreases as the payment is deferred into the future.").

II.

The final issue is whether the non-profit employer's reimbursement obligation constitutes an excise tax on a pre-petition transaction under 11 U.S.C. § 507(a)(8)(E).[31] The statute requires that reimbursement obligations constitute an "excise tax" on "a transaction," "occurring before the date of the filing of the petition." The Bankruptcy Code provides no definition of "excise" or "excise tax." *Reorganized CF & I Fabricators*, 518 U.S. at 220, 116 S.Ct. 2106. In determining whether a tax is an "excise tax," courts have used a range of definitions, some broader than others. In the context of bankruptcy priority, the non-profit employer's reimbursement obligation constitutes an excise tax on a transaction--a tax on the act of employing workers. *See In re Suburban Motor Freight, Inc.*, 998 F.2d 338, 340 n. 3 (6th Cir. 1993) (noting that an excise tax may be based upon a transaction or act of employing); *see also In re DeRoche*, 287 F.3d 751, 757 (9th Cir. 2002) ("act of employing a worker without carrying required insurance" constitutes a "transaction" under 11 U.S.C. § 507(a)(8)(E)); 9E Am.Jur.2d *Bankruptcy* § 3099 ("For priority purposes, an 'excise tax' covers practically any tax which is not an ad valorem tax and which is imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege."). All of the employment that contributed to United Healthcare's reimbursement obligation occurred pre-petition. Therefore, the reimbursement obligation is an excise tax on a pre-petition transaction.

For these reasons, I would have affirmed the judgment of the District Court.

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[31] The majority did not have to reach this issue.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4768

IN RE: UNITED HEALTHCARE SYSTEM, INC., Debtor

THE RECONSTITUTED COMMITTEE OF
UNSECURED CREDITORS OF THE UNITED
HEALTHCARE SYSTEM, INC.,

Appellant

v.

STATE OF NEW JERSEY DEPARTMENT OF LABOR

On Appeal from the United States District Court
for the New Jersey
(D.C. Civ. No. 03-01024)
District Judge: Honorable Joseph A. Greenaway, Jr.

Argued October 28, 2004

Before: SCIRICA, Chief Judge, FISHER, and GREENBERG, Circuit Judges.

JUDGEMENT

This cause came on the be considered on the record from the United State District Court for the New Jersey and was argued on October 28, 2004.

On consideration whereof, it is hereby ADJUDGED and ORDERED by this Court that order of the said district court of November 13, 2003, is reversed, and the case is remanded to the district court for further proceedings in accordance with this opinion.

Costs taxed against appellee.

Attest:

/s/ Marcia M. Waldron
Clerk

DATED: January 24, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

February 14, 2005

No. 03-4768

IN RE: UNITED HEALTHCARE SYSTEM, INC.,
Debtor

THE RECONSTITUTED COMMITTEE OF UNSECURED CREDITORS OF UNITED HEALTHCARE SYSTEM, INC.,
Appellant
v.
STATE OF NEW JERSEY DEPARTMENT OF LABOR
(District of New Jersey (Newark) D.C. No. 03-cv-01024)

Present: SCIRICA, Chief Judge, FISHER, and GREENBERG, Circuit Judges.

1. Motion by the New Jersey Department of Labor to Stay the Mandate.

2. Response in Opposition by Appellant, Reconstituted Committee.

3. Reply Response by New Jersey Department of Labor.

/s/ Phyllis Ruffin/rls
Case Manager 267-299-4918

Response due 2/28/05
Published Opn & Jmt 1/24/05
Mdt to issue 2/28/05

ORDER

The foregoing motion to stay the mandate is granted. This stay shall be deemed vacated without further order upon the first of the following events taking place: (1) The New Jersey

Department of Labor does not file a timely petition for certiorari; (2) the Supreme Court denies certiorari; or (3) the Supreme Court affirms this court in this case. In the event that the Supreme Court grants certiorari and makes a disposition other than affirming either party may file such motion as it deems appropriate with respect to this order granting a stay.

By the Court,

/s/ Morton I. Greenberg
Circuit Judge

Dated: March 2, 2005
par/cc: J.A.K., Esq.
D.J.O'G., Esq.
M.S.N., Esq.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re:	:	Civil Action No. 03-1024 (JAG)
UNITED HEALTHCARE SYSTEM, INC.	:	
Debtor.	:	**ORDER**
RECONSTITUTED COMMITTEE OF UNSECURED CREDITORS OF UNITED HEALTHCARE SYSTEM, INC.,	:	
Appellant,	:	
vs.	:	
STATE OF NEW JERSEY DEPARTMENT OF LABOR,	:	
Appellee.	:	

This matter having come before the Court by way of appeal by the Reconstituted Committee of Unsecured Creditors of United Healthcare System, Inc ("Appellant") of the December 30, 2002 Order of the United State Bankruptcy Court, District of New Jersey (Winfield, J.) (the "Bankruptsy Order"), which incorporated by reference the September 3, 2002 Opinion of that Court, which held that the obligation of a nonprofit organization to reimburse a state unemployment compensation agency for benefits paid to its employees is an excise tax entitled to priority under §507(a)(8)(E) of the Bankruptcy Code; and it appearing that this Court had jurisdiction over the appeal of the Bankruptcy order, pursuant

to 28 U.S.C. § 158(A); and the Court having conducted a *de novo* review of the relevant Order and Opinion and the submissions of the parties; and it further appearing that the Federal Unemployment Tax Act ("FUTA") imposes "on every employer . . . an excise tax, with respect to having individuals in his employ" 26 U.S.C. § 3301; and it further appearing that New Jersey unemployment compensation contributions are collected under state statutes conforming to, and pursuant to, FUTA, *see Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 402 (3d Cir.1982); *California v. Grace Brethren Church*, 457 U.S. 393, 417 (1982); and it further appearing that, under *City of New York v. Feiring*, 313 U.S.283, 285(1941), reimbursements to state unemployment compensation agency for benefits paid to employees meet the test for a tax, *see also In re Lorber Industries of California*, 675 F.2d 1062 (9th Cir. 1982); *Ohio Bureau of Worker's Compensation v. Yoder*. 36 F.3d 484 (6th Cir. 1994); and it further appearing that an excise tax obligation is entitled to priority under 11 U.S.C. §507(a)(8)(E); and good cause appearing;

IT IS on this 13th day of November, 2003.

ORDERED that Appellant's appeal of the Bankruptcy Order is DENIED; and

IT IS FURTHER ORDERED that the Bankruptcy Order is AFFIRMED; and

IF IS FURTHER ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of this Order.

Joseph A. Greenaway, Jr.
U.S.D.J.

United States Bankruptcy Court,
D. New Jersey.
In re UNITED HEALTHCARE SYSTEMS INC., Debtors.
No. 97-21785(NLW).
Sept. 3, 2002.

Dennis J. O'Grady, Esq., J. Alex Kress, Esq., Riker, Danzig, Scherer, Hyland & Perretti, LLP, Morristown, NJ, for the Official Committee of Unsecured Creditors of United Healthcare Systems, Inc.
John C. Turi, Deputy Attorney General, Office of the Attorney General of NJ, Trenton, NJ, for New Jersey Department of Labor.

OPINION

NOVALYN L. WINFIELD, Bankruptcy Judge.

The issue presently before the Court is whether the reimbursement claim filed by the New Jersey Department of Labor ("NJDL" or the "Department") against the debtor, United Healthcare System, Inc., ("United" or the "Debtor") should be afforded priority of payment as either an administrative expense claim pursuant to 11 U.S.C. §§ 503(b)(1)(B) and 507(a)(1), or a priority tax claim pursuant to 11 U.S.C. § 507(a)(8)(D) or (E). The Official Committee of Unsecured Creditors (the "Committee") asserts that the administrative expense claim and the priority tax claim filed by NJDL should both be reclassified as general unsecured claims and paid accordingly. For the reasons set forth at greater length below, and after consideration of the undisputed facts and the pertinent statutory and case authority, this Court finds that, subject to the Committee's right to challenge the mathematical computations of the claims, NJDL holds an administrative expense claim in the amount of $79,226.90, and a priority tax claim in the amount of $9,164,463.24.

This Court has jurisdiction in this matter under 28 U.S.C. § 1334, and the Standing Order of Reference issued by the

United States District Court for the District of New Jersey on July 23, 1984. This proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(K), arising in the bankruptcy case of the Debtor pending before this Court. The following constitutes the Court's findings of fact and conclusions of law as required by Federal Rules of Bankruptcy Procedure 7052.

FACTS

United, which was the Children's Hospital of New Jersey, was a nonprofit corporation that provided hospital and healthcare services primarily to Newark, Orange and Irvington, New Jersey. On February 19, 1997, United filed for Chapter 11 relief under Title 11 of the Bankruptcy Code. Within forty-eight (48) hours after it filed its bankruptcy petition, United ceased providing healthcare services and either discharged its patients to their homes or transferred them to other healthcare facilities.

Upon discovering United's predicament, and in accordance with the NJDL's procedures when dealing with mass layoffs, the NJDL dispatched a crew to United to process the employees' claims for unemployment benefits. These claims were primarily processed on February 25, 26, and 27, 1997, and ultimately given a claim date of March 9, 1997. United essentially ceased all employment as of March 8, 1997.

Though most New Jersey employers are contributory employers required to make quarterly unemployment payments to the NJDL based on a percentage of their employees' wages, as a nonprofit organization, United was entitled, in lieu of making quarterly contribution payments, to instead elect to reimburse the NJDL only for those benefits actually paid to its former employees. *See* N.J.S.A. 43:21-7.2, *et seq.* (the "Election Statute"). United made such an election in 1972 and

reimbursed the NJDL pursuant to this election each year until it filed for bankruptcy in 1997.[1]

Before its bankruptcy case was commenced, United failed to reimburse NJDL for the unemployment benefits NJDL paid to its former employees for the fourth quarter of 1996 and the first quarter of 1997. As set forth in the Amended Proof of Claim of the State of New Jersey Division of UI/DI Financing ("Priority Claim") submitted by NJDL, unpaid prepetition reimbursement charges amount to $932,704.37, together with interest as of the petition date of $8,597.93, for a total of $941,302.30. Additionally, the Priority Claim includes other unpaid prepetition obligations such as employer State disability plan contributions and assessments and worker unemployment and disability contributions for a total Priority Claim amount of $1,156,170.05.

The NJDL also filed an Amended Administrative Proof of Claim for the State of New Jersey Division of Employer Accounts which totals $8,302,427.84 ("Administrative Claim"). The greatest portion of the Administrative Claim constitutes reimbursement charges that NJDL attributes to the unemployment benefits which it paid to former United employees postpetition as a result of United's shutdown within weeks after filing its Chapter 11 case. The claimed amount due for postpetition reimbursement charges amounts to $6,240,640.63, with interest through December 17, 2000 of $1,982,520.58, for a total of $8,223,160.94.

It is important to understand how NJDL calculates the reimbursement charges which constitute the larger portions of the Priority Claim and the Administrative Claim. The amount

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[1] The terms "payment in lieu of contribution" and "reimbursement charge" both describe the obligation owed by a nonprofit entity to the state unemployment compensation fund for benefits paid to former employees, and the terms will be used interchangeably throughout the opinion.

of weekly unemployment benefits payable to an individual is based on the average weekly wage during his base year, subject to a maximum amount per week and per claim. N.J.S.A. 43:21-3. The Base Year usually consists of "the first four of the last five completed quarters immediately preceding an individual's benefit year."[2] N.J.S.A. 43:21-19(c)(1). A benefit year consists of "the 364 consecutive calendar days" following the date upon which a claim for benefits is filed. N.J.S.A. 43:21-19(d). As indicated earlier, March 9, 1997 was the claim date for the benefits paid to United's employees who were let go shortly after the Chapter 11 case was commenced. Working from that date, the Base Year was calculated to be the fourth quarter of 1995, and the first, second and third quarters of 1996, all of which fall within the prepetition period.

The Administrative Claim also includes a claim for unpaid postpetition employer contributions and other obligations such as assessments for the State disability plan. After filing its petition, United was no longer entitled to make reimbursement payments pursuant to the Election Statute. Instead, United was required to participate as a contributory employer, making quarterly payments based on a percentage of its employees' wages. This portion of the Administrative Claim is based on wages paid to the few employees that remained after the shutdown and the total, inclusive of interest and penalties, amounts to $79,266.90.

Initially, the Committee objected to the NJDL claim on the basis that the Debtor's books and records did not reflect the amounts claimed by NJDL.[3] That objection was superceded by

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[2] The statute provides for alternate Base Years in the event a claimant is not able to satisfy the requirements of the regular Base Year. N.J.S.A. 43:21-19(c)(1).

[3] Earlier in the case, the Debtor and the Committee divided the litigation responsibilities, with the Debtor undertaking the preference litigation and the Committee concentrating on claims analysis and objections.

the objections set forth in its Memorandum of Law in Further Support of Committee's Motion to Expunge, Reduce and Reclassify the Priority and Administrative Claims of the New Jersey Department of Labor. The Committee now seeks to reclassify most of the Administrative Claim and the Priority Claim as a general unsecured claim. It concedes that it is appropriate to grant administrative expense status to the unpaid employer/employee contributions and related expenses incurred postpetition because certain employees were employed for a short time after the bankruptcy filing. Accordingly, subject to verifying the mathematical computation and underlying data, the Committee agrees that $79,266.90 of the Administrative Claim is properly classified as such. Similarly, the Committee concedes that some portion of the Priority Claim may be entitled to that classification because a portion of it is based on United's failure to pay the employees' contribution for disability insurance which was withheld from employees' wages. However, the Committee reserves the right to further review the amount and classification of this portion of the NJDL Priority Claim. At present, the Committee's objection to the NJDL claim is directed solely at reclassifying as general unsecured claims the Priority Claim reimbursement charges totaling $941,302.30, and the Administrative Claim reimbursement charges totaling $8,223,160.94. With regard to both claims, the Committee asserts that the reimbursement charges are not taxes and therefore are not subject to classification under any subparagraph of 11 U.S.C. § 507(a)(8). The Committee also argues that the reimbursement charges sought as part of the NJDL Administrative Claim do not meet any of the criteria for administrative claims under 11 U.S.C. § 503(b). NJDL emphatically disagrees with the Committee's analysis.

DISCUSSION

A. Reimbursement Charges are Taxes.

As a preliminary matter, the Committee reminds the Court that "[e]quality of distribution among creditors is a central policy of the Bankruptcy Code." *Begier v. Internal Revenue Servic* 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990). Further, it is well recognized that statutory priorities are narrowly construed because it is presumed that the debtor's limited resources will be equally distributed among his creditors. *See Trustees of the Amalgamated Insurance Fund v. McFarlin's Inc.*, 789 F.2d 98, 100-101 (2d Cir.1986); *In re Metro Transportation Co.*, 117 B.R. 143, 154 (Bankr. E.D. Pa. 1990).

However, it is an unfortunate reality that in many cases bankruptcy estate funds will not be sufficient to pay all creditors. Thus, section 507 reflects that Congress has determined that certain classes of claims should be preferred over, and paid ahead of, other claims. Accordingly, although it is reasonable to construe priorities narrowly so that some estate funds will be available for payment of general unsecured claims, the Court must not construe a priority so narrowly that it undercuts the purpose of a particular priority. The Court should, if possible, rule in a fashion that recognizes the competing bankruptcy policies embodied in the statute. With these competing policies in mind, the Court must examine the question for consideration: whether a payment in lieu of contribution is a tax, and if so, whether it falls within the scope of one of the subsections of 11 U.S.C. § 507(a)(8).

Because the term "tax" is not a defined term in the Bankruptcy Code, it is necessary to look to case law for assistance. Whether a state statute creates a tax within the meaning of the bankruptcy statute is a federal question. *See State of New Jersey v. Anderson*, 203 U.S. 483, 491-92, 27 S.Ct. 137, 51 L.Ed. 284 (1906). Further, a tax has been defined by the Supreme Court as "a pecuniary burden laid upon

individuals or [their] property" regardless of their consent, for the purpose of defraying the expenses of government or of undertakings authorized by it. *City of New York v. Feiring*, 313 U.S. 283, 285, 61 S.Ct. 1028, 85 L.Ed. 1333 (1941); *see also Anderson*, 203 U.S at 492, 27 S.Ct. 137. Application of this definition in the bankruptcy context has not been an easy task, and courts have formulated additional criteria for determining when a governmental claim is entitled to priority treatment. The two cases that are most cited for additional criteria that identify the attributes of a tax are *County Sanitation Dist. No. 2 of Los Angeles County v. Lorber Indus. of California, Inc.* (*In re Lorber Industries of California*), 675 F.2d 1062 (9th Cir.1982) and *Ohio Bureau of Workers' Compensation v. Yoder*, (*In re Suburban Motor Freight, Inc.*), 36 F.3d 484 (6th Cir.1994) ("*Suburban II*").

In *Lorber*, the Ninth Circuit considered whether the claim filed by a county sanitation district for fees imposed on the debtor to dispose of hazardous waste constituted a tax entitled to priority treatment. The Court identified the elements that characterize a tax to be as follows: "(a) an involuntary pecuniary burden, regardless of name, laid upon individuals or property; (b) imposed by, or under authority of the legislature; (c) for public purposes, including the purposes of defraying expenses of government or undertakings authorized by it; (d) under the police or taxing power of the state." 675 F.2d at 1066. Finding that Lorber's obligation arose from its decision to acquire a permit and use the sanitation system to dispose of its wastewater, the Court characterized the obligation to the sanitation district as voluntary and more contractual in nature, and thus not a tax entitled to priority. *Id.*, at 1067.

In *Suburban II*, the Ohio workers' compensation bureau claimed priority status for reimbursement of workers' compensation payments which it had made as a result of the debtor's failure to pay premiums when it was a participant in the workers' compensation fund, and the debtor's failure to pay claims which arose when it was a self-insured employer. The Sixth Circuit found that meeting the criteria of the *Lorber* test

was necessary in order for a government claim to be afforded priority as an excise tax, but that it was not enough to meet the concerns expressed by the Sixth Circuit in its earlier decision, *Yoder v. Ohio Bureau of Workers' Compensation* (*In re Suburban Motor Freight, Inc.*), 998 F.2d 338 (6th Cir.1993) (*Suburban I*) *See Suburban II*, 36 F.3d at 488-89.

In *Suburban I*, the Court observed that the problem with the *Lorber* test is that all monies collected by the government is used to defray its expenses and is used for public purposes. 998 F.2d at 341. It thus concluded that "[t]he threat of the Lorber reasoning then, is that the Government automatically wins priority for all money any debtor owes it, regardless of the nature of the payments." *Id.* Accordingly, to limit the breadth of the "public purpose" prong, *Suburban II* posited that the government exaction (1) must be universally applicable to similarly situated entities; and (2) that according priority treatment to the government claim does not disadvantage private creditors with like claims. *Suburban II*, 36 F.3d at 488.

The Committee argues that after applying the *Lorber* test as modified by *Suburban II*, the Court must find that the non-tax attributes of the reimbursement charges sought by the NJDL outweigh the tax attributes. Specifically, the Committee contends that the reimbursement charges are voluntary because the reimbursement charges arise solely from United's voluntary act of making the election to make payments in lieu of contribution to the Unemployment Compensation Fund, instead of participating as a contributing employer. The Committee also urges that the non-tax nature of the reimbursement charges is evident from their contingent nature; they are paid only if the employee is discharged, files a claim and is qualified, and only to the extent the employee was employed by the employer during the Base Year. Thus, the Committee suggests that the reimbursement charges fail the *Suburban II* requirement that a government obligation be universally applicable to similarly situated entities. Finally, the Committee urges that this Court follow the reasoning articulated by the First Circuit in *In re Boston Regional Medical Center, Inc.*, 291 F.3d 111, 122 (1st

Cir. 2002). There, the First Circuit stated that the right of the Massachusetts Division of Employment and Training to require a nonprofit employer to provide a surety bond tipped the scales in favor of finding that an employer's payment in lieu of contribution was not a tax. The First Circuit found the bond requirement decisive because one of the reasons that Congress affords priority in payment for certain taxes is that taxing authorities are involuntary creditors who cannot take security in advance. *Id.*, at 122-23. The Committee submits that this Court should find that the ability of the New Jersey Labor Commissioner to require a not for profit entity to post a bond to secure payment of reimbursement charges tips the scales in favor of a finding that non-tax attributes predominated.

Although some of the Committee's arguments are not without weight, they are ultimately not as persuasive as those advanced by NJDL in support of its contention that reimbursement charges are taxes entitled to priority treatment.

The NJDL correctly points out that the New Jersey statute requires all employers covered by the statute to contribute to the unemployment compensation fund. N.J.S.A. 43:21-7. The only choice afforded any nonprofit entity is to pay quarterly unemployment insurance contributions, like for-profit entities, or to reimburse NJDL for any unemployment benefits NJDL paid to its former employees. N.J.S.A. 43:21-7.2.[4] [FN4]

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[4] N.J.S.A. 43:21-7.2 specifically addresses nonprofit organizations. At paragraph (a)(1) it provides:
(1) Any nonprofit organization which is, or becomes, subject to the Unemployment Compensation Law on or after January 1, 1972, shall pay contributions under the provisions of R.S. 43:21-7, unless it elects in accordance with this paragraph to pay to the unemployment fund an amount equal to the amount of regular benefits and 1/2 of the extended benefits paid that are attributable to base year service in the employ of such nonprofit organization during the effective period of such election.

At paragraph (a)(9) it further states that "[a]s of the effective date of the termination of an election to make payments in lieu of contributions, a

Because United could not escape its statutory obligation to make payments to the Unemployment Compensation Fund, it was subject to an involuntary pecuniary burden imposed by the legislature as described in the Lorber test. United was only able to choose how to make the payments, not whether to make the payments. The Committee simply misperceives the significance of this choice. Regardless of how it paid, as an employer in the State of New Jersey, United was required to contribute to the unemployment compensation fund, and the reimbursement charges owed to NJDL are involuntary exactions. *See, e.g., In re Sacred Heart Hospital of Norristown*, 209 B.R. 650, 656 (E.D. Pa.1997) (payments in lieu of contributions are required by the Pennsylvania Statute and are involuntary payments); *In re Cottage Grove Hospital*, 265 B.R. 241, 245 (Bankr. D.Or. 2001) (reimbursement payments to Oregon Unemployment Trust Fund were not voluntarily incurred).

It is also readily evident that the New Jersey unemployment compensation law was enacted for a public purpose and pursuant to the police power. The statute declares that "economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature . . . ." N.J.S.A. 43:21-2. The statute further states that the effects of involuntary unemployment can be partially met by "the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance," and that the Legislature was enacting the unemployment compensation law "under the police powers of the state." *Id.* This statutorily articulated purpose accordingly satisfies the *Lorber* requirements that a tax serve a public

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nonprofit organization shall become liable to pay unemployment insurance contributions on taxable wages paid to its employees subsequent to the termination."

purpose and be enacted under the police or taxing power of the state.

The Court also agrees with NJDL that the reimbursement charges satisfy the two elements of the public purpose test set out in *Suburban II*. As previously discussed, the New Jersey statute requires all employers to make payments to the unemployment compensation fund. Moreover, like the Pennsylvania statute discussed in *Sacred Heart Hospital*, 209 B.R. at 656, the New Jersey statute does not permit any private or self-insurance options. Therefore, the requirements that the exaction be universally applicable and that the government claim not disadvantage private creditors with like claims are also met.

It should be noted that the First Circuit Court of Appeals recently reached a contrary result in *In re Boston Regional Medical Center, Inc.*, 291 F.3d 111 (1st Cir.2002). It grounded its holding that payments in lieu of contributions are not taxes in part on its determination that such obligations are not universally applicable as required by the *Suburban II* test. 291 F.3d at 122. The Court stated that "[t]he distinction between the payments required to sustain a government undertaking as a whole and those required merely to compensate for the costs imposed by a particular participant is significant." *Id.* In this regard, the Court found it important that employers who make contribution payments shoulder the costs for administering the system, and keeping the system solvent; whereas, employers making payments in lieu of contributions only reimburse the unemployment compensation fund for the costs directly attributable to them. *Id.*

This Court respectfully disagrees that there is a material difference between employer contribution payments and payments in lieu of contributions for purpose of satisfying the universality requirement of the *Suburban II* test. In *Suburban II*, the Court stated that "[t]he universality requirement ensures that the financial exaction's burden and benefit inure to the general public welfare, and that it not provide a discrete benefit

to, or result from privileges claimed by, the payor." 36 F.3d at 488-89. Both employer contributions and payments in lieu of contributions meet this concern because they are paid to the unemployment compensation fund for the purpose of providing benefits designed to prevent unemployed workers from becoming a public burden. The fact that employers paying contributions absorb a greater share of the cost, does not mean that payments in lieu of contributions are not universal, and therefore not taxes. The payment burden of many tax statutes falls unevenly on taxpayers. One such statute that readily comes to mind is the federal income tax statute. Depending on a taxpayers eligibility for deductions, exclusions, or credits, even within a particular tax bracket some taxpayers will pay more, and others will pay less. Yet, the tax payments made by each are contributed for the general welfare of the country. Notably, in one of its first decisions which addressed the constitutionality of the unemployment compensation act, the Supreme Court held that a state is free to select the subjects of taxation and to grant exemptions, and due process does not impose upon a state any rigid rule of equality of taxation. *See Carmichael, et al. v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S.Ct. 868, 81 L.Ed. 1245 (1937).

The Court in *Boston Regional* also finds it significant that the nonprofit employers who may elect to make payments in lieu of contributions are also exempt from federal income tax. *See Boston Regional*, 291 F.3d at 122. Similarly, the Committee also argues that the legislative history reveals that Congress intended to continue the non-taxable status of nonprofits, and therefore the reimbursement charges should not be viewed as taxes. It quotes the Senate Report as follows:

> Under existing Federal law, services performed for nonprofit religious, charitable, educational and humane organizations and for a State and its political subdivisions are exempt from the tax provisions of the Federal Unemployment Tax Act . . . . The committee does not want to change the

> present tax status of nonprofit organizations, but is concerned about the need of their employees for protection against wage loss resulting from unemployment.
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> [*S.Rep. No.* 91-752, 91st Cong., 2nd Session, *reprinted in* 1970 U.S.Code, Cong., Admin. News 3606, 3617-18 (Mar. 26, 1970)]

Further, the Committee argues that the non-tax nature of the reimbursement charges is evident from the following statements in the Senate Report:

> The States would be required also to provide nonprofit organizations with the option of reimbursing the State for unemployment compensation payments attributable to service with the organization in lieu of paying contributions under the normal tax provisions of the State law. *In effect, the nonprofit organizations would be allowed to adopt a form of self-insurance.* Under the reimbursement method of financing, a nonprofit organization whose workers experience no compensated unemployment in a year would have no unemployment insurance costs for the year. The committee considers it appropriate that these organizations, which are often dependent upon charitable contributions, should not be required to share in the costs of providing benefits to workers in profit-making enterprises.
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> [*Id.* at 3618] (emphasis added).

However, neither the legislative history cited by the Committee nor the exemption afforded nonprofit organizations from payment of federal income tax state a Congressional intent that nonprofit organizations be exempted from state unemployment taxes. First, as is evident from the legislative history, Congress only exempted nonprofit organizations from the tax provisions of the Federal Unemployment Tax Act, it did not exempt nonprofit organizations from state unemployment taxes. Instead, both the federal statute and its legislative history are simply silent as to how to characterize payments in lieu of contribution. Second, the legislative history merely describes payments in lieu of contributions as being a form of self insurance. In fact, such description is not quite accurate because payments are made to former employees from the unemployment compensation fund rather than the nonprofit entity as is typically done under a self-insurance program. The statement in the Senate Report analogizing payments in lieu of contributions to self-insurance makes more sense if we read it to mean that by making payments in lieu of contributions, nonprofit organizations, like self-insurers, will experience reduced costs in connection with the payment of benefits. Moreover, such a reading is consistent with the concern expressed in the Senate Report that because nonprofit entities are often dependent on charitable contributions they should not be required to share in the cost of providing benefits to workers in profit-making enterprises. All of this is entirely consistent with a reduced tax burden, rather than no tax burden.

Finally, the fact that nonprofit organizations are exempt from federal income tax does not indicate that payments in lieu of contribution are not taxes. Importantly, a nonprofit organization which does not make the election must pay employer contributions. Moreover, in New Jersey, if any nonprofit organization fails to timely make its payments in lieu of contributions, its right to the election may be terminated. In such case, the nonprofit entity can only make employer contributions. N.J.S.A. 43:21- 7.2(g). It is well settled that employer contributions to state unemployment and disability funds are taxes. *Sipe v. Amerada Hess Corp.*, 689 F.2d 396,

402 (3rd Cir.1982); *In re William, Akers, Jr. Co., Inc.*, 121 F.2d 846, 851 (3rd Cir.1941). Thus, it is readily apparent that nonprofit employers in New Jersey may be subject to pay unemployment compensation taxes notwithstanding their exemption from federal income taxes.

In *United States v. Reorganized CF & I Fabricators of Utah, Inc., et al.*, 518 U.S. 213, 116 S.Ct. 2106, 135 L.Ed.2d 506 (1996), the Supreme Court addressed whether the government's claim arising under 26 U.S.C. § 4971(a) was an excise tax entitled to priority treatment, or a penalty entitled to treatment only as an unsecured claim. The Court found that to answer the question posed, it had to engage in a functional examination of § 4971(a). 518 U.S. at 224, 116 S.Ct. 2106. For the legal framework for this analysis, the court relied on its prior decisions under the Bankruptcy Act, noting that "In each instance the decision turned on the actual effects of the exactions." *Id.* at 221, 116 S.Ct. 2106.

The Court in *Sacred Heart Hospital* performed such an analysis in reaching its conclusion that payments in lieu of contributions are taxes. It determined that because all employers were required to contribute payments in lieu of contributions the payments were involuntary. 209 B.R. at 656. It found that the payments benefitted the public generally, because "compensating unemployed workers reduces the chances of them becoming poor and making demands on the federal and state welfare system and thus all taxpayers." *Id.* The Court also contrasted the payments in lieu of contributions with worker's compensation fund premiums where state law permits employers to (i) subscribe to the state run fund, (ii) obtain private insurance, or (iii) self insure. It readily concluded that by reason of these choices, payment to the worker's compensation fund is neither mandatory nor monopolistic because insurance coverage can be obtained elsewhere. *Id.* at 657. By contrast, no private insurance exists for the unemployment compensation and there is no true self insurance because the employer only reimburses the fund for payments the fund makes to former employees. *Id.*

As previously discussed, the New Jersey statute is essentially similar to the Pennsylvania statute and application of the analysis provided in *Sacred Heart Hospital* to the present matter yields the conclusion that the payments in lieu of contributions permitted by the New Jersey worker's compensation statute are also taxes.

In *Boston Regional*, the decisive factor for the First Circuit was the fact that the nonprofit employer could be required to provide a surety bond to insure collection of payments in lieu of contributions. *Boston Regional*, 291 F.3d at 122. It reasoned that the ability to require a bond gives the Massachusetts Division of Employment and Training the ability to choose its debtors and to obtain advance security, thereby eliminating the primary reason for giving taxes preferred treatment in a bankruptcy case. *Id.*, at 122-23, citing *H.R. Rep.* No. 95-595, at 190 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6150. The ability of a government to require a bond cuts against one of the reasons that Congress granted a priority of payment to taxes in bankruptcy, but it does not describe a non-tax attribute. As NJDL points out, under the State Tax Uniform Procedure Law, the Director of the Division of Taxation, "may require a bond or other security ... for the payment of any taxes, interest, and penalties imposed pursuant to any state tax law...." N.J.S.A. 54:49-2.

It is possible however, that a surety with the same claim as the government could be disadvantaged if the government claim received priority. In such a case one of the two criteria of the *Suburban II* test would not be met. Nonetheless, like the Court in *Sacred Heart Hospital*, this Court finds that the other tax-like attributes of the payments in lieu of contributions out-weigh "this single non-tax characteristic." *Sacred Heart Hospital*, 209 B.R. at 658.

B. Reimbursement Charges Enjoy Priority Under § 507(a)(8)(E)

The obligation of United to reimburse the New Jersey Unemployment Compensation Fund for benefits paid to former United employees fits within the definition of excise tax. Although "excise tax" is not a defined term in the Bankruptcy Code, it has been characterized as an indirect tax in that it is not directly imposed upon persons or property. *New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund*, 886 F.2d 714, 719 (4th Cir.1989). Moreover, it is understood as a tax that is imposed on the performance of an act, the engaging in any occupation, or the enjoyment of a privilege. *Id.*; *Cottage Grove Hospital*, 265 B.R. at 245, n. 10; *In re Templar*, 170 B.R. 562, 563 (Bankr. M.D. Pa.1994). Most broadly, excise taxes are held to be involuntary payments imposed to serve a public purpose. *In re Ludlow Hospital Society, Inc.*, 216 B.R. 312, 319 (Bankr. D.Mass.1997). NJDL urges that United's act of employing workers constitutes conduct contemplated by the foregoing definitions. The NJDL points out that the Pennsylvania Supreme Court has found that unemployment contributions are imposed on employers for the privilege of employing workers. *Department of Labor & Indus. v. New Enterprise Rural Elec. Co-op.*, 352 Pa. 413, 43 A.2d 90, 92 (1945) ("unemployment compensation contributions constitute an excise tax on the right to employ"). This Court agrees. Because reimbursement charges, like contributions arise from the privilege or act of employing workers, they too are excise taxes. Accordingly, the reimbursement charges owed by United fall under section 507(a)(8)(E)(ii) which provides priority of payment to excise taxes on a "transaction occurring during the three years immediately proceeding the date of the filing of the petition."

C. Reimbursement Charges Are Not Employment Taxes

However, the Committee is correct in its assessment that the reimbursement charges sought by NJDL are not entitled to priority under section 507(a)(8)(D) because they are not levied

on wages, salaries, or commissions, but result instead from the amount of benefits paid to former employees under N.J.S.A. 43:21-7.2. The reimbursement charges are removed in time from the payment of wages, in that they are based on benefits paid only after unemployment occurs and the employee qualifies for benefits. There is no immediate connection between the wage earned and the benefit paid. To grant priority to the NJDL's reimbursement claim as an employment tax would serve to expand the narrowly defined priority given to employment taxes under the Code.

Most persuasive is the analysis provided by the Bankruptcy Court in *In re Boston Regional Medical Center*, 256 B.R. 212 (Bankr.D.Mass.2000). The Boston Regional court pointed out that the reimbursement charges are not collected directly from the payroll when wages are paid, but are assessed against the employer after the unemployment benefits are paid. *Id.* at 226. Further, the reimbursement charges are based not on employment but unemployment, and the amount varies not because the size of the payroll fluctuates, but because the numbers of former employees who qualify for and receive benefits varies. *Id.* Finally, as observed by the Bankruptcy Appellate Panel, reimbursement charges may not be calculated solely on a wage, salary or commission earned from the debtor. Although the unemployment benefits (and therefore the reimbursement charges) are calculated from a base year of wages paid, the amount of reimbursement charges for which an electing nonprofit employer may be liable will be affected if the employee claiming the benefits had other employers in the base period. *See In re Boston Regional Medical Center*, 265 B.R. 838, 846 (1st Cir. B.A.P. 2001). Accordingly, because there is only an indirect correspondence between wages or salary paid and reimbursement charges assessed against a debtor that is an electing nonprofit employer, this Court finds that reimbursement charges are not employment taxes within the meaning of § 507(a)(8)(D).

D. Reimbursement Charges Are Not Properly Classified As Administrative Expenses

Nor are the reimbursement charges sought by NJDL entitled to administrative expense priority under 11 U.S.C. §§ 507(a)(1) and 503(b). NJDL relies on the fact that the employees were discharged postpetition and the benefit payments were made postpetition, for its conclusion that the reimbursement charges are entitled to a first priority of payment. The state's position fails because under § 503(b)(1)(B), only taxes "incurred by the estate" and not "a tax of a kind specified in § 507(a)(8) . . ." can be classified as administrative expenses. Logically then, only postpetition taxes can be treated as administrative expenses, because prior to the commencement of a bankruptcy case there is no bankruptcy estate. Further, because this section specifically excepts taxes under § 507(a)(8), an excise tax will only be entitled to administrative expense status if the "transaction" on which it is based occurs postpetition and is thus incurred by the estate. L. King, *Collier on Bankruptcy*, ¶ 503.07[2][e] (15th ed. revised 2002).

As the Committee points out, United made its election in lieu of contributions well before it filed for bankruptcy protection. Secondly, and most importantly, all of the employment on which the reimbursement charges are based, occurred in the prepetition period. The Base Year on which unemployment benefit s are paid are "the first four of the last five completed calendar quarters immediately preceding an individual's benefit year." N.J.S.A. 43:21-19(c)(1). Accordingly, the Base Year for former United employees was the fourth quarter of 1995, and the first, second and third quarters of 1996, all of which fell within the prepetition period. Administrative expense status is only appropriate for claims based on postpetition services. *See In re Roth American, Inc.*, 975 F.2d 949, 957 (3d Cir.1992) (holding that severance and vacation pay claims are afforded administrative expense priority to the extent those payments reimburse services

provided to the estate postpetition). As explained in *In re Boston Regional Med. Ctr.*, 256 B.R. 212,

> Section 503(b)(1)(B)(i) defines administrative expenses to include only those taxes that are incurred by the estate, not those that the debtor incurred prepetition, before the estate was created. Accordingly, a tax statute must be applied with recognition that two distinct entities are involved--one existing up to the date of filing, and a second, the estate, existing from and after the filing--and that the latter is not responsible, on an administrative expense basis, for the liabilities of the former.
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> [*Id.* at 228-29.]

Thus, the only administrative expense claim that NJDL holds is its claim for $79,226.90, based on employer contributions due on employment in the postpetition period.

CONCLUSION

As set forth at greater length in the preceding paragraphs, the Court finds that the NJDL is not entitled to administrative priority under § 503(b)(1)(B) since no taxes were incurred by the estate. Further, the obligation of a nonprofit organization to reimburse a state unemployment compensation agency for benefits paid to its employees is an excise tax, and thus entitled to priority under § 507(a)(8)(E) of the Bankruptcy Code. Accordingly, pursuant to § 503(b)(1)(B), the NJDL's administrative claim is hereby denied to the extent that it is based on pre-petition acts, and pursuant to § 507(a)(8)(E), the NJDL's reimbursement claim is hereby granted priority status.

11 U.S.C.A. § 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

. . .

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--
(A) a tax on or measured by income or gross receipts--
(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;
(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or
(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

. . .

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;
(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (3) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;
(E) an excise tax on--

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or
(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

. . .

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

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26 U.S.C.A. § 3301. Rate of tax

There is hereby imposed on every employer (as defined in section 3306(a)) for each calendar year an excise tax, with respect to having individuals in his employ, equal to--

(1) 6.2 percent in the case of calendar years 1988 through 2007; or

(2) 6.0 percent in the case of calendar year 2008 and each calendar year thereafter;

of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

* * * * * *

26 U.S.C.A. § 3304. Approval of State laws

(a) Requirements.--The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that--

(1) all compensation is to be paid through public employment offices or such other agencies as the Secretary of Labor may approve;

(2) no compensation shall be payable with respect to any day of unemployment occurring within 2 years after the first day of the first period with respect to which contributions are required;

(3) all money received in the unemployment fund shall (except for refunds of sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section 3305(b)) immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904 of the Social Security Act (42 U.S.C. 1104);

(4) all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b); except that--

(A) an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration;

(B) the amounts specified by section 903(c)(2) or 903(d)(4) of the Social Security Act may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices;

(C) nothing in this paragraph shall be construed to prohibit deducting an amount from unemployment compensation otherwise payable to an individual and using the amount so deducted to pay for health insurance, or the withholding of Federal, State, or local individual income tax, if the individual elected to have such deduction made and such deduction was made under a program approved by the Secretary of Labor;

(D) amounts may be deducted from unemployment benefits and used to repay overpayments as provided in section 303(g) of the Social Security Act;

(E) amounts may be withdrawn for the payment of short-time compensation under a plan approved by the Secretary of Labor; and

(F) amounts may be withdrawn for the payment of allowances under a self-employment assistance program (as defined in section 3306(t));

. . .

(6)(A) . . .

(B) payments (in lieu of contributions) with respect to service to which section 3309(a)(1) applies may be made into the State unemployment fund on the basis set forth in section 3309(a)(2);

. . .

(b) Notification.--The Secretary of Labor shall, upon approving such law, notify the governor of the State of his approval.

(c) Certification.--On October 31 of each taxable year the Secretary of Labor shall certify to the Secretary of the Treasury each State whose law he has previously approved, except that he shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Secretary of Labor finds has amended its law so that it no longer contains the provisions specified in subsection (a) or has with respect to the 12-month period ending on such October 31 failed to comply substantially with any such provision in such subsection. No finding of a failure to comply substantially with

any provision in paragraph (5) of subsection (a) shall be based on an application or interpretation of State law (1) until all administrative review provided for under the laws of the State has been exhausted, or (2) with respect to which the time for judicial review provided by the laws of the State has not expired, or (3) with respect to which any judicial review is pending. On October 31 of any taxable year, the Secretary of Labor shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Secretary of Labor finds has failed to amend its law so that it contains each of the provisions required by law to be included therein (including provisions relating to the Federal-State Extended Unemployment Compensation Act of 1970 (or any amendments thereto) as required under subsection (a)(11)), or has, with respect to the twelve-month period ending on such October 31, failed to comply substantially with any such provision.

(d) Notice of noncertification.--If at any time the Secretary of Labor has reason to believe that a State whose law he has previously approved may not be certified under subsection (c), he shall promptly so notify the governor of such State . . . .

* * * * * * *

26 U.S.C.A. § 3306. Definitions

. . .

(c) Employment.--For purposes of this chapter, the term "employment" means any service performed . . . , and (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of . . ., except --

(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

(f) Unemployment fund.--For purposes of this chapter, the term "unemployment fund" means a special fund, established under a State law and administered by a State agency, for the payment of compensation. Any sums standing to the account of the State agency in the Unemployment Trust Fund established by section 904 of the Social Security Act, as amended (42 U.S.C. 1104), shall be deemed to be a part of the unemployment fund of the State, and no sums paid out of the Unemployment Trust Fund to such State agency shall cease to be a part of the unemployment fund of the State until expended by such State agency. An unemployment fund shall be deemed to be maintained during a taxable year only if throughout such year, or such portion of the year as the unemployment fund was in existence, no part of the moneys of such fund was expended for any purpose other than the payment of compensation (exclusive of expenses of administration) and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b); except that--

(1) an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration;

(2) the amounts specified by section 903(c)(2) or 903(d)(4) of the Social Security Act may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices,[5]

(3) nothing in this subsection shall be construed to prohibit deducting any amount from unemployment compensation otherwise payable to an individual and using the amount so deducted to pay for health insurance, or the withholding of Federal, State, or local individual income tax, if the individual

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[5] So in original. The comma probably should be a semicolon.

elected to have such deduction made and such deduction was made under a program approved by the Secretary of Labor;

(4) amounts may be deducted from unemployment benefits and used to repay overpayments as provided in section 303(g) of the Social Security Act;

(5)[4] amounts may be withdrawn for the payment of short-time compensation under a plan approved by the Secretary of Labor; and

(5)[4] amounts may be withdrawn for the payment of allowances under a self-employment assistance program (as defined in subsection (t)).

(g) Contributions.--For purposes of this chapter, the term "contributions" means payments required by a State law to be made into an unemployment fund by any person on account of having individuals in his employ, to the extent that such payments are made by him without being deducted or deductible from the remuneration of individuals in his employ.

* * * * * * *

26 U.S.C.A. §3309. State law coverage of services performed for nonprofit organizations or governmental entities

(a) State law requirements.--For purposes of section 3304(a)(6) --

(1) except as otherwise provided in subsections (b) and (c), the services to which this paragraph applies are--

(A) service excluded from the term "employment" solely

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[4] So in original. Two pars. (5) have been enacted.

[4] So in original. Two pars. (5) have been enacted.

by reason of paragraph (8) of section 3306(c), and
(B) service excluded from the term "employment" solely by reason of paragraph (7) of section 3306(c); and

(2) the State law shall provide that a governmental entity, including an Indian tribe, or any other organization (or group of governmental entities or other organizations) which, but for the requirements of this paragraph, would be liable for contributions with respect to service to which paragraph (1) applies may elect, for such minimum period and at such time as may be provided by State law, to pay (in lieu of such contributions) into the State unemployment fund amounts equal to the amounts of compensation attributable under the State law to such service. The State law may provide safeguards to ensure that governmental entities or other organizations so electing will make the payments required under such elections.

* * * * * * *

N.J.S.A. 43:21-2. Declaration of state public policy

As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general

welfare of the citizens of this state requires the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed after qualifying periods of employment.

N.J.S.A. 43:21-3. Benefits

(a) Payment of benefits.

All benefits shall be promptly paid from the fund in accordance with such regulations as may be prescribed hereunder.

(b) Weekly benefits for unemployment.

With respect to an individual's benefit year commencing on or after July 1, 1961, such individual, if eligible and unemployed (as defined in subsection (m) of R.S.43:21-19), shall be paid an amount (except as to final payment) equal to his weekly benefit rate less any remuneration, other than remuneration from self-employment paid to an individual who is receiving a self-employment assistance allowance, paid or payable to him for such week in excess of 20% of his weekly benefit rate (fractional part of a dollar omitted) or $5.00, whichever is the greater; provided that such amount shall be computed to the next lower multiple of $1.00 if not already a multiple thereof.

(c) Weekly benefit rate.

(1) With respect to an individual whose benefit year commences after September 30, 1984, his weekly benefit rate under each determination shall be 60% of his average weekly wage, subject to a maximum of 56 2/3 % of the Statewide average weekly remuneration paid to workers by employers subject to this chapter (R.S.43:21-1 et seq.), as determined and promulgated by the Commissioner of Labor and Workforce Development; provided, however, that such individual's weekly

benefit rate shall be computed to the next lower multiple of $1.00 if not already a multiple thereof.

(2) Dependency benefits.

(A) With respect to an individual whose benefit year commences after September 30, 1984, the individual's weekly benefit rate as determined in paragraph (1) of this subsection (c) will be increased by 7% for the first dependent and 4% each for the next two dependents (up to a maximum of three dependents), computed to the next lower multiple of $1.00 if not already a multiple thereof, except that the maximum weekly benefit rate payable for an individual claiming dependency benefits shall not exceed the maximum amount determined under paragraph (1) of this subsection (c).

. . .

(3) For the purposes of this subsection (c), the "Statewide average weekly remuneration paid to workers by employers" shall be computed and determined by the Commissioner of Labor and Workforce Development on or before September 1 of each year on the basis of one-fifty-second of the total remuneration reported for the preceding calendar year by employers subject to this chapter, divided by the average of the number of workers reported by such employers, and shall be effective as to benefit determinations in the calendar year following such computation and determination.

(d) Maximum total benefits.

(1) (A) . . .

(B) (i) With respect to an individual for whom benefits shall be payable for benefit years commencing on or after July 1, 1986, and before July 1, 2003 as provided in this section, the individual shall be entitled to receive a total amount of benefits equal to three-quarters of the individual's base weeks with all employers in the base year multiplied by the individual's

weekly benefit rate; but the amount of benefits thus resulting under that determination shall be adjusted to the next lower multiple of $1.00 if not already a multiple thereof. With respect to an individual for whom benefits shall be payable for benefit years commencing on or after July 1, 2003 as provided in this section, the individual shall be entitled to receive a total amount of benefits equal to the number of the individual's base weeks with all employers in the base year multiplied by the individual's weekly benefit rate; but the amount of benefits thus resulting under that determination shall be adjusted to the next lower multiple of $1.00 if not already a multiple thereof.

(ii) Except as provided pursuant to paragraph (1) of subsection (c) of R.S.43:21-7, benefits paid to an individual for benefit years commencing on or after July 1, 1986 shall be charged against the accounts of the individual's base year employers in the following manner:

Each week of benefits paid to an eligible individual shall be charged against each base year employer's account in the same proportion that the wages paid by each employer to the individual during the base year bear to the wages paid by all employers to that individual during the base year.

* * * * * * *

N.J.S.A. 43:21-4. Benefit eligibility conditions

Benefit eligibility conditions. An unemployed individual shall be eligible to receive benefits with respect to any week only if:

(a) The individual has filed a claim at an unemployment insurance claims office and thereafter continues to report at an employment service office or unemployment insurance claims office, ...

(b) The individual has made a claim for benefits in accordance with the provisions of subsection (a) of R.S.43:21-6.

(c) (1) The individual is able to work, and is available for work, and has demonstrated to be actively seeking work, ...

. . .

(d) With respect to any benefit year commencing before January 1, 2002, the individual has been totally or partially unemployed for a waiting period of one week in the benefit year which includes that week. When benefits become payable with respect to the third consecutive week next following the waiting period, the individual shall be eligible to receive benefits as appropriate with respect to the waiting period . . . ..

. . .

(e) (1) . . .

(2) With respect to benefit years commencing on or after January 1, 1996 and before January 7, 2001, except as otherwise provided in paragraph (3) of this subsection, the individual has, during his base year as defined in subsection of R.S.43:21-19:

(A) Established at least 20 base weeks as defined in paragraph (2) of subsection (t) of R.S.43:21-19; or

(B) If the individual has not met the requirements of subparagraph (A) of this paragraph (2), earned remuneration not less than an amount 12 times the Statewide average weekly remuneration paid to workers, as determined under R.S.43:21-3(c), which amount shall be adjusted to the next higher multiple of $100 if not already a multiple thereof; or

(C) If the individual has not met the requirements of subparagraph (A) or (B) of this paragraph (2), earned remuneration not less than an amount 1,000 times the minimum wage in effect pursuant to section 5 of P.L.1966, c. 113 (C.34:11- 56a4) on October 1 of the calendar year preceding the calendar year in which the benefit year commences, which

amount shall be adjusted to the next higher multiple of $100.00 if not already a multiple thereof.

. . .

(6) The individual applying for benefits in any successive benefit year has earned at least six times his previous weekly benefit amount and has had four weeks of employment since the beginning of the immediately preceding benefit year. This provision shall be in addition to the earnings requirements specified in paragraph (2), (3), (4) or (5) of this subsection, as applicable.

. . .

* * * * * *

N.J.S.A. 43:21-5. Disqualification for benefits

An individual shall be disqualified for benefits:

(a) For the week in which the individual has left work voluntarily without good cause attributable to such work, and for each week thereafter until the individual becomes reemployed and works four weeks in employment, which may include employment for the federal government, and has earned in employment at least six times the individual's weekly benefit rate, as determined in each case . . . .

(b) For the week in which the individual has been suspended or discharged for misconduct connected with the work, and for the five weeks which immediately follow that week (in addition to the waiting period), as determined in each case. . . . .

If the discharge was for gross misconduct connected with the work because of the commission of an act punishable as a crime of the first, second, third or fourth degree under the "New Jersey Code of Criminal Justice," N.J.S.2C:1-1 *et seq.*, the individual shall be disqualified . . . and no benefit rights shall

accrue to any individual based upon wages from that employer for services rendered prior to the day upon which the individual was discharged.

. . .

(c) If it is found that the individual has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the director or to accept suitable work when it is offered, or to return to the individual's customary self-employment (if any) when so directed by the director . . .

. . .

(d) If it is found that this unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which the individual is or was last employed . . . .

(e) For any week with respect to which the individual is receiving or has received remuneration in lieu of notice.

(f) For any week with respect to which or a part of which the individual has received or is seeking unemployment benefits under an unemployment compensation law of any other state or of the United States; . . . .

(g) (1) For a period of one year from the date of the discovery by the division of the illegal receipt or attempted receipt of benefits contrary to the provisions of this chapter, as the result of any false or fraudulent representation; provided that any disqualification may be appealed in the same manner as any other disqualification imposed hereunder; and provided further that a conviction in the courts of this State arising out of the illegal receipt or attempted receipt of these benefits in any proceeding instituted against the individual under the provisions of this chapter or any other law of this State shall be conclusive upon the appeals tribunal and the board of review.

. . .

* * * * * * * *

N.J.S.A. 43:21-7. Contributions..

Employers other than governmental entities, whose benefit financing provisions are set forth in section 4 of P.L.1971, c. 346 (C.43:21-7.3), and those nonprofit organizations liable for payment in lieu of contributions on the basis set forth in section 3 of P.L.1971, c. 346 (C.43:21-7.2), shall pay to the controller for the unemployment compensation fund, contributions as set forth in subsections (a), (b) and (c) hereof, and the provisions of subsections (d) and (e) shall be applicable to all employers, consistent with the provisions of the "unemployment compensation law" and the "Temporary Disability Benefits Law," P.L.1948, c. 110 (C.43:21-25 *et seq.*).

(a) Payment.

(1) Contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this chapter (R.S.43:21-1 et seq.), with respect to having individuals in his employ during that calendar year, at the rates and on the basis hereinafter set forth. Such contributions shall become due and be paid by each employer to the controller for the fund, in accordance with such regulations as may be prescribed, and shall not be deducted, in whole or in part, from the remuneration of individuals in his employ.

. . .

(b) Rate of contributions. Each employer shall pay the following contributions:

(1) For the calendar year 1947, and each calendar year thereafter, 2 7/10 % of wages paid by him during each such calendar year, except as otherwise prescribed by subsection (c) of this section.

. . .

(c) Future rates based on benefit experience.

(1) A separate account for each employer shall be maintained and this shall be credited with all the contributions which he has paid on his own behalf on or before January 31 of any calendar year with respect to employment occurring in the preceding calendar year; provided, however, . . . But nothing in this chapter (R.S.43:21-1 et seq.) shall be construed to grant any employer or individuals in his service prior claims or rights to the amounts paid by him into the fund either on his own behalf or on behalf of such individuals. Benefits paid with respect to benefit years commencing on and after January 1, 1953, to any individual on or before December 31 of any calendar year with respect to unemployment in such calendar year and in preceding calendar years shall be charged against the account or accounts of the employer or employers in whose employment such individual established base weeks constituting the basis of such benefits, . . . Benefits paid under a given benefit determination shall be charged against the account of the employer to whom such determination relates. When each benefit payment is made, either a copy of the benefit check or other form of notification shall be promptly sent to the employer against whose account the benefits are to be charged. Such copy or notification shall identify the employer against whose account the amount of such payment is being charged, shall show at least the name and social security account number of the claimant and shall specify the period of unemployment to which said check applies. If the total amount of benefits paid to a claimant and charged to the account of the appropriate employer exceeds 50% of the total base year, base week wages paid to the claimant by that employer, then such employer shall have canceled from his account such excess benefit charges as specified above.

Each employer shall be furnished an annual summary statement of benefits charged to his account.

. . .

(6) Additional contributions.

Notwithstanding any other provision of law, any employer who has been assigned a contribution rate pursuant to subsection (c) of this section for the year commencing July 1, 1948, and for any year commencing July 1 thereafter, may voluntarily make payment of additional contributions, and upon such payment shall receive a recomputation of the experience rate applicable to such employer, including in the calculation the additional contribution so made. Any such additional contribution shall be made during the 30-day period following the date of the mailing to the employer of the notice of his contribution rate as prescribed in this section, unless, for good cause, the time for payment has been extended by the controller for not to exceed an additional 60 days; provided that in no event may such payments which are made later than 120 days after the beginning of the year for which such rates are effective be considered in determining the experience rate for the year in which the payment is made. Any employer receiving any extended period of time within which to make such additional payment and failing to make such payment timely shall be, in addition to the required amount of additional payment, a penalty of 5% thereof or $5.00, whichever is greater, not to exceed $50.00. Any adjustment under this subsection shall be made only in the form of credits against accrued or future contributions.

. . .

(d) Contributions of workers to the unemployment compensation fund and the State disability benefits fund.

(1) (A) For periods after January 1, 1975, each worker shall contribute to the fund 1% of his wages with respect to his employment with an employer, which occurs on and after January 1, 1975, after such employer has satisfied the condition set forth in subsection (h) of R.S.43:21-19 with respect to becoming an employer; . . .

(B) Effective January 1, 1978 there shall be no contributions by workers in the employ of any governmental or nongovernmental employer electing or required to make payments in lieu of contributions unless the employer is covered by the State plan under the "Temporary Disability Benefits Law" (C. 43:21-37 et seq.), and in that case contributions shall be at the rate of 1/2 of 1%, except that commencing July 1, 1986, workers in the employ of any nongovernmental employer electing or required to make payments in lieu of contributions shall be required to make contributions to the fund at the same rate prescribed for workers of other nongovernmental employers.

(C) (i) Notwithstanding the above provisions of this paragraph (1), during the period starting July 1, 1986 and ending December 31, 1992, each worker shall contribute to the fund 1.125% of wages paid with respect to his employment with a governmental employer electing or required to pay contributions or nongovernmental employer, including a nonprofit organization which is an employer as defined under R.S.43:21-19(h)(6), regardless of whether that nonprofit organization elects or is required to finance its benefit costs with contributions to the fund or by payments in lieu of contributions, after that employer has satisfied the conditions set forth in subsection R.S.43:21- 19(h) with respect to becoming an employer. . . .

. . .

(D) Notwithstanding any other provisions of this paragraph (1), during the period starting January 1, 1993 and ending June 30, 1994, each worker shall contribute to the unemployment compensation fund 0.5% of wages paid with respect to the worker's employment with a governmental employer electing or required to pay contributions or nongovernmental employer, including a nonprofit organization which is an employer as defined under paragraph (6) of subsection (h) of R.S.43:21-19, regardless of whether that nonprofit organization elects or is required to finance its benefit costs with contributions to the

fund or by payments in lieu of contributions, after that employer has satisfied the conditions set forth in subsection (h) of R.S.43:21-19 with respect to becoming an employer . . .

Each worker shall, starting on January 1, 1996 and ending March 31, 1996, contribute to the unemployment compensation fund 0.60% of wages paid with respect to the worker's employment with a governmental employer electing or required to pay contributions or nongovernmental employer, including a nonprofit organization which is an employer as defined under paragraph (6) of subsection (h) of R.S.43:21-19, regardless of whether that nonprofit organization elects or is required to finance its benefit costs with contributions to the fund or by payments in lieu of contributions, after that employer has satisfied the conditions set forth in subsection (h) of R.S.43:21-19 with respect to becoming an employer . . .

(E) Each employer shall, notwithstanding any provision of law in this State to the contrary, withhold in trust the amount of his workers' contributions from their wages at the time such wages are paid, shall show such deduction on his payroll records, shall furnish such evidence thereof to his workers as the division or controller may prescribe, and shall transmit all such contributions, in addition to his own contributions, to the office of the controller in such manner and at such times as may be prescribed. If any employer fails to deduct the contributions of any of his workers at the time their wages are paid, or fails to make a deduction therefor at the time wages are paid for the next succeeding payroll period, he alone shall thereafter be liable for such contributions, and for the purpose of R.S.43:21-14, such contributions shall be treated as employer's contributions required from him.

(F) As used in this chapter (R.S.43:21-1 et seq.), except when the context clearly requires otherwise, the term "contributions" shall include the contributions of workers pursuant to this section.

(G) Each worker shall, starting on July 1, 1994, contribute to the State disability benefits fund an amount equal to 0.50% of wages paid with respect to the worker's employment with a . . . nongovernmental employer, including a nonprofit organization which is an employer as defined under paragraph (6) of subsection (h) of R.S.43:21-19, unless the employer is covered by an approved private disability plan or is exempt from the provisions of the "Temporary Disability Benefits Law," P.L. 1948, c. 110 (C.43:21-25 et seq.) under section 7 of that law (C.43:21-31) or any other provision of that law.

. . .

(4) If an individual does not receive any wages from the employing unit which for the purposes of this chapter (R.S.43:21-1 et seq.) is treated as his employer, or receives his wages from some other employing unit, such employer shall nevertheless be liable for such individual's contributions in the first instance; and after payment thereof such employer may deduct the amount of such contributions from any sums payable by him to such employing unit, or may recover the amount of such contributions from such employing unit, or, in the absence of such an employing unit, from such individual, in a civil action; provided proceedings therefor are instituted within three months after the date on which such contributions are payable. General rules shall be prescribed whereby such an employing unit may recover the amount of such contributions from such individuals in the same manner as if it were the employer.

. . .

(6) Contributions by workers, payable to the controller as herein provided, shall be exempt from garnishment, attachment, execution, or any other remedy for the collection of debts.

(e) Contributions by employers to State disability benefits fund.

(1) Except as hereinafter provided, each employer shall, in addition to the contributions required by subsections (a), (b), and (c) of this section, contribute 1/2 of 1% of the wages paid by such employer to workers with respect to employment unless he is not a covered employer as defined in section 3 of the "Temporary Disability Benefits Law" (C.43:21-27 (a)), ... Such contributions shall become due and be paid by the employer to the controller for the State disability benefits fund as established by law, in accordance with such regulations as may be prescribed, and shall not be deducted, in whole or in part, from the remuneration of individuals in his employ. In the payment of any contributions, a fractional part of a cent shall be disregarded unless it amounts to $0.005 or more, in which case it shall be increased to $0.01.

. . .

(3) (A) The rates of contribution as specified in subparagraph (1) above shall be subject to modification as provided herein with respect to employer contributions due on and after July 1, 1951.

(B) A separate disability benefits account shall be maintained for each employer required to contribute to the State disability benefits fund and such account shall be credited with contributions deposited in and credited to such fund with respect to employment occurring on and after January 1, 1949. Each employer's account shall be credited with all contributions paid on or before January 31 of any calendar year on his own behalf and on behalf of individuals in his service with respect to employment occurring in preceding calendar years; . . . . But nothing in this act shall be construed to grant any employer or individuals in his service prior claims or rights to the amounts paid by him to the fund either on his own behalf or on behalf of such individuals. Benefits paid to any covered individual in accordance with Article III of the "Temporary Disability Benefits Law" on or before December 31 of any calendar year with respect to disability in such calendar year and in preceding calendar years shall be charged against the account of the

employer by whom such individual was employed at the commencement of such disability or by whom he was last employed, if out of employment.

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N.J.S.A. 43:21-7.2. Nonprofit organizations

(a) Notwithstanding any other provisions of the Unemployment Compensation Law,[1] [FN1] for payments of contributions by employers, benefits paid to individuals in the employ of nonprofit organizations, as described in section 501(c)(3) of the Internal Revenue Code[2] and which are exempt from income tax under section 501(a) of the Internal Revenue Code,[3] shall be financed in accordance with the following provisions:

(1) Any nonprofit organization which is, or becomes, subject to the Unemployment Compensation Law on or after January 1, 1972, shall pay contributions under the provisions of R.S. 43:21-7, unless it elects in accordance with this paragraph to pay to the unemployment fund an amount equal to the amount of regular benefits and 1/2 of the extended benefits paid that are attributable to base year service in the employ of such nonprofit organization during the effective period of such election;

(2) Any nonprofit organization which is, or becomes, subject to the Unemployment Compensation Law on January 1, 1972, may elect to become liable for payments in lieu of contributions for a period of not less than two calendar years beginning with January 1, 1972, provided it files a written notice of its election within the 120-day period immediately following such date or within a like period immediately

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[1] N.J.S.A. §§ 43:21-1 *et seq.*

[2] 26 U.S.C.A. § 501(c)(3).

[3] 26 U.S.C.A. § 501(a).

following the enactment of this act, whichever occurs later;

(3) Any nonprofit organization which becomes subject to the Unemployment Compensation Law after January 1, 1972, may elect to become liable for payments in lieu of contributions for a period of not less than two calendar years beginning with the date on which such subjectivity begins, by filing a written notice of its election not later than 120 days immediately following the date of such subjectivity or not later than 30 days from the date such organization is notified of its subjectivity, whichever is later;

(4) Any nonprofit organization which makes an election in accordance with paragraph (2) or paragraph (3) shall be liable for payments in lieu of contributions on benefits paid that are attributable to base year service in the employ of such organization during the effective period of the election. Any nonprofit organization may file a written notice terminating its election not later than February 1 of any year with respect to which the termination is to become effective;

(5) Any nonprofit organization which has been paying contributions under the Unemployment Compensation Law for a period subsequent to January 1, 1972, may change to a reimbursable basis by filing not later than February 1 of any calendar year a written notice of election to become liable for payments in lieu of contributions. Such election shall not be terminable by the organization during that calendar year or the next calendar year;

(6) For good cause the period within which a notice of election or a notice of termination must be filed may be extended and a retroactive election may be permitted;

(7) If an election for payments in lieu of contributions is terminated by a nonprofit organization or canceled, the nonprofit organization shall remain liable for payments in lieu of contributions with respect to all benefits paid, based on base year wages earned in the employ of such nonprofit organization

during the effective period of the election;

(8) In accordance with such regulations as may be prescribed, such nonprofit organization shall be notified of any determination which may be made of the effective date and the termination date of any such election and such determination shall be subject to reconsideration, appeal and review; and

(9) As of the effective date of the termination of an election to make payments in lieu of contributions, a nonprofit organization shall become liable to pay unemployment insurance contributions on taxable wages paid to its employees subsequent to the termination. Its contribution rate beginning with the first July 1 in the period following the termination of an election shall be assigned in accordance with the provisions of R.S. 43:21-7, except that:

(A) The benefit charges to its account which are attributable to base year services in the employ of such nonprofit organization during the effective period of its election to make payments in lieu of contributions shall not be included in the total benefit charges to its account in the calculation of its reserve balance for determining its rate under R.S. 43:21-7(c);

(B) Its average annual payroll shall be determined without inclusion of any of the wages paid in any calendar year during which its election to make payments in lieu of contributions was effective for any part of the calendar year;

(C) The period during which the election to make payments in lieu of contributions was effective shall not be included in calculating the period of eligibility for modification of its rate under R.S. 43:21-7(c)(3);

(D) For the period from the date of the termination of its election to the July 1 following termination, the nonprofit organization shall be assigned a rate of 1% for

contributions under the Unemployment Compensation Law.

(b) Reimbursement payments. At the end of each calendar month, or at the end of any other period as determined by the controller, the controller shall bill each nonprofit organization or group of such organizations which has elected to make payments in lieu of contributions for an amount equal to the full amount of regular benefits plus 1/2 of the amount of any extended benefits paid during such month or other prescribed period that are attributable to base year service of individuals in the employ of such organization during the effective period of the election, and the provisions of the Unemployment Compensation Law (R.S. 43:21-1 et seq.), and the amendments and supplements thereto, shall be applicable with respect to the payment of claims for benefits and the charging thereof; provided, however, that no employer who elects to make payments in lieu of contributions shall be relieved of any charges for benefits paid to his workers by reason of R.S. 43:21-6(b)(1), R.S. 43:21-7(c)(1), or section 6 of chapter 324 of the Laws of 1970 (C. 43:21-24.12, Extended Benefits Law).

(c) Payment of any bill rendered under subsection (b) above shall be made not later than 30 days after such bill was mailed to the last known address of the nonprofit organization or was otherwise delivered to it, unless there has been an application for review and redetermination in accordance with subsection (e).

(d) Payments made by any nonprofit organization under the provisions of this section shall not be deducted or deductible, in whole or in part, from the remuneration of individuals in the employ of the organization.

(e) The amount of any payment required under subsection (b) from any nonprofit organization, as specified in any bill from the controller, shall be conclusive on the organization, unless, not later than 15 days after the bill was mailed to its last known address or otherwise delivered to it, the organization

files an application for redetermination by the controller, setting forth the grounds for such application. The controller shall promptly review and reconsider the amount specified in the bill and shall thereafter issue a redetermination in any case in which such application for redetermination has been filed. Any such redetermination shall be conclusive on the organization, unless, not later than 15 days after the redetermination was mailed to its last known address or otherwise delivered to it, the organization files an appeal to the controller, setting forth the grounds for the appeal. Proceedings on appeal to the controller from the amount of a bill rendered under this subsection or a redemption of such amount shall be in accordance with the rules and regulations of the controller.

(f) Any organization failing to file a timely report or to make a timely payment of the amount in lieu of contributions due hereunder shall be subject to the same interest, penalties, remedies and methods of enforcement that apply to contributions and reports due under the provisions of the Unemployment Compensation Law.

(g) If any nonprofit organization is delinquent in making payments in lieu of contributions as required under this section, the controller may terminate such organization's election to make payments in lieu of contributions as of the January 1 immediately following, and such termination shall be effective for at least two calendar years and until all payments due the division have been satisfied.

(h) Provision for bond or other security. In the discretion of the controller, any nonprofit organization that elects to become liable for payments in lieu of contributions shall be required, within 30 days after the effective date of its election, to execute and file with the controller a surety bond approved by the controller or it may elect instead to deposit with the controller money or securities approved by the controller. The amount of the bond or deposit shall be determined by the controller and shall not exceed the amount derived by multiplying the organization's taxable wages for the preceding

calendar year, or the organization's estimated taxable wages for the ensuing year, whichever is the greater, by the maximum unemployment insurance contribution rate in effect at the beginning of the calendar year for which the bond or deposit is required; provided, however, that any organization which is a self-insurer and is exempt from insuring workers' compensation liability under the Workers' Compensation Law shall, so long as such exemption remains in effect, be exempt from the surety bond and security deposit requirements of this subsection; and any other organization which shall satisfy the controller as to its financial ability to meet the cost of benefits provided under the Unemployment Compensation Law and the Temporary Disability Benefits Law[4] may, upon application, be exempted from such requirements by written order of the controller, which order shall be revocable at any time.

(1) Bond. The amount of any bond deposited under this subsection shall require adjustments as the controller deems appropriate. If the bond is to be increased, the adjusted bond shall be filed by the organization within 30 days after notice of the required adjustment was mailed or otherwise delivered to it. Failure of any organization covered by such bond to pay the full amount of payment in lieu of contributions when due, together with any applicable interest and penalties, shall render the surety liable on said bond, to the extent of said bond as though the surety was such organization.

(2) Deposit of money or securities. Any deposit of money or securities in accordance with this subsection shall be retained by the controller in an escrow account until liability under the election is terminated, at which time it shall be returned to the organization, less any deductions as hereinafter provided. The controller may deduct from any money deposited under this subsection by a nonprofit organization, or sell the securities it has so deposited, to the extent necessary to satisfy any due and unpaid payments in lieu of contributions and any

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[4] 43:21-5 *et seq.*

applicable interest and penalties. The controller shall require the organization within 30 days following any deduction from a money deposit or sale of deposited securities under the provisions of this subsection to deposit sufficient additional money or securities to make whole the organization's deposit at the prior level. Any cash remaining from the sale of such securities shall be a part of the organization's escrow account. The controller may at any time review the adequacy of the deposit made by any organization. If, as a result of such review, the controller determines that an adjustment is necessary, it shall require the organization to make an additional deposit within 30 days of written notice of the controller's determination or shall return to it such portion as the controller no longer considers necessary, as deemed appropriate. Disposition of income from securities held in escrow shall be governed by applicable State law.

(3) Authority to terminate elections. If any nonprofit organization fails to file a bond or make a deposit, or to increase or make whole the amount of a precisely made bond or deposit, as provided under this subsection, the controller may terminate such organization's election to make payments in lieu of contributions and such termination shall continue for no less than 24 calendar months, beginning with the first quarter in which such termination becomes effective, provided the controller may extend for good cause the applicable filing, deposit or adjustment period by not more than 90 days.

(i) Group accounts. Two or more employers that have become liable for payments in lieu of contributions may file a joint application for the establishment of a group account for the purpose of sharing the cost of benefits paid that are attributable to services in the employ of such employers. Each such application shall identify and authorize a group representative to act as the group's agent for the purpose of this subsection. Upon approval of the application, a group account shall be established for such employers, effective as of the beginning of the calendar quarter in which the application is received or the next calendar quarter, as appropriate, and the

group's representative shall be notified of the effective date of the account. Such account shall remain in effect for not less than two calendar years and thereafter until terminated or upon application by the group. Regulations may be prescribed as necessary with respect to applications for establishment, maintenance, and termination of group accounts authorized by this subsection, for addition of new members to, and withdrawal of active members from, such accounts, and for the determination of the amounts that are payable under this subsection by members of the group, and the time and manner of such payments.

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N.J.S.A. 43:21-9. Unemployment compensation fund

(a) Establishment and control. There is hereby established as a special fund, separate and apart from all public moneys or funds of this State, an unemployment compensation fund, which shall be administered by the Department of Labor exclusively for the purpose of this chapter (R.S. 43:21-1 et seq.). This fund shall consist of: (1) all contributions and payments in lieu of contributions collected under this chapter (R.S. 43:21-1 et seq.); (2) interest earned upon any moneys in the fund; (3) any property or securities acquired through the use of moneys belonging to the fund; (4) all earnings on such property or securities; (5) all moneys credited to this State's account in the unemployment trust fund pursuant to section 903 of the Social Security Act (42 U.S.C. § 1103), as amended; and (6) all moneys received for the fund from any other source. All moneys in this fund shall be mingled and undivided.

(b) Accounts and deposits. The Treasurer of the State of New Jersey shall be ex officio the treasurer and custodian of the fund and shall administer such fund in accordance with the directions of the department and shall issue his warrants upon it in accordance with such regulations as the department shall prescribe. He shall maintain within the fund three separate accounts: (1) a clearing account, (2) an unemployment trust

fund account, and (3) a benefit account. All moneys payable to the fund, upon receipt thereof by the department, shall be forwarded to the treasurer, who shall immediately deposit them in the clearing account. Refunds payable pursuant to subsection (f) of section 43:21-14 of this Title may be paid from the clearing account upon warrants issued by the treasurer under the direction of the controller. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the Secretary of the Treasury of the United States of America to the credit of the account of this State in the unemployment trust fund, established and maintained pursuant to section 904 of the Social Security Act (42 U.S.C. § 1104), as amended, any provisions of law in this State relating to the deposit, administration, release or disbursement of moneys in the possession or custody of this State to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this State's account in the unemployment trust fund. Moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the controller, in any bank or public depository in which general funds of the State may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. The treasurer shall give a separate bond conditioned upon the faithful performance of his duties as custodian of the fund in an amount fixed by the controller and in a form prescribed by law or approved by the Attorney General. Premiums for said bond shall be paid from the administration fund.

(c) Withdrawals from the unemployment trust fund.

(1) Benefit payments. Moneys requisitioned from this State's account in the unemployment trust fund shall be used solely for the payment of benefits and in accordance with regulations prescribed by the division, except that money credited to this State's account pursuant to section 903 of the Social Security Act (42 U.S.C. § 1103), as amended, may be used for the payment of expenses for the administration of this chapter (R.S. 43:21-1 et seq.), as provided in paragraph (2) of this subsection. The controller shall from time to time

requisition from the unemployment trust fund such amounts, not exceeding the amounts standing to its account therein, as it deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account, and the payment of benefits shall be made solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to any provisions of law requiring specific appropriations of other formal release by State officers of money in their custody. All warrants for the payment of benefits shall be issued by and bear only the signature of the Commissioner of Labor or his duly authorized agent for that purpose. All warrants for the payment of refunds shall be issued by the treasurer and bear the signature of the treasurer and the countersignature of the commissioner or his duly authorized agent for that purpose. Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the department, shall be deposited with the Secretary of the Treasury of the United States of America, to the credit to this State's account in the unemployment trust fund, as provided in subsection (b) of this section.

(2) Administrative use. Moneys credited to the account of this State by the Secretary of the Treasury of the United States in the unemployment trust fund pursuant to section 903 of the Social Security Act (42 U.S.C. § 1103), as amended, may be requisitioned and used for the payment of expenses for the administration of the Unemployment Compensation Law (R.S. 43:21-1 et seq.), pursuant to a specific appropriation by the Legislature, provided that the expenses are incurred and the moneys are requisitioned after the enactment of an appropriation law which:

(A) specifies the purposes for which such moneys are appropriated and the amounts appropriated therefor;

(B) limits the period within which such moneys may be obligated to a period ending not more than two years after the date of the enactment of the appropriation law; and

(C) limits the moneys which may be obligated during a 12-month period beginning on July 1 and ending on the next June 30 to a sum which does not exceed the amount by which the aggregate of the moneys credited to the account of this State pursuant to section 903 of the Social Security Act (42 U.S.C. § 1103), as amended, during the same 12-month period and the 34 preceding 12- month periods, exceeds the aggregate of moneys obligated for the payment of expenses incurred for the administration of this chapter (R.S. 43:21-1 et seq.) and the moneys paid out for benefits, which is charged against the moneys credited to the account of this State during such 35 12-month periods.

Moneys credited to this State's account in the unemployment trust fund under section 903 of the Social Security Act (42 U.S.C. § 1103), as amended, which are obligated for the payment of expenses for the administration of this chapter (R.S. 43:21-1 et seq.) or paid out for benefits, shall be charged against equivalent amounts which were first credited and which are not already so charged; except that no moneys obligated for the payment of expenses for the administration of this chapter (R.S. 43:21-1 et seq.) during a 12-month period specified herein may be charged against any amount credited during such a 12-month period earlier than the thirty-fourth preceding such period.

Money appropriated as provided herein for the payment of expenses of administration shall be requisitioned as needed for the payment of obligations incurred under such appropriation and upon requisition shall be deposited in the unemployment compensation administration fund from which such payments shall be made. Money so deposited shall, until expended,

remain a part of the unemployment compensation fund. If such money will not be expended, it shall be returned promptly to the Secretary of the Treasury of the United States for credit to this State's account in the unemployment trust fund. The controller shall maintain a separate record of the credits, appropriation, obligation and expenditure of the money credited to the account of this State in the unemployment trust fund pursuant to section 903 of the Social Security Act (42 U.S.C. § 1103), as amended.

(d) Management of funds upon discontinuance of unemployment trust fund. The provisions of subsections (a), (b) and (c) to the extent that they relate to the unemployment trust fund shall be operative only so long as such unemployment trust fund continues to exist and so long as the Secretary of the Treasury of the United States of America continues to maintain for this State a separate book account of all funds deposited therein by this State for benefit purposes, together with this State's proportionate share of the earnings of such unemployment trust fund, from which no other state is permitted to make withdrawals. If and when such unemployment trust fund ceases to exist, or such separate book account is no longer maintained, all moneys, properties, or securities therein belonging to the unemployment compensation fund of this State shall be transferred to the treasurer of the unemployment compensation fund, who shall hold, invest, transfer, sell, deposit and release such moneys, properties or securities in a manner approved by the department, in accordance with the provisions of this chapter; provided that such moneys shall be invested in the following readily marketable classes of securities: bonds or other interest-bearing obligations of the United States of America and of the State of New Jersey; and provided, further, that such investment shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits. The treasurer shall dispose of securities or other properties belonging to the unemployment compensation fund only under the direction of the department.

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N.J.S.A. 43:21-19. Definitions

As used in this chapter (R.S.43:21-1 et seq.), unless the context clearly requires otherwise:

. . .

(b) "Benefits" means the money payments payable to an individual, as provided in this chapter (R.S.43:21-1 et seq.), with respect to his unemployment.

(c) (1) "Base year" with respect to benefit years commencing on or after July 1, 1986, shall mean the first four of the last five completed calendar quarters immediately preceding an individual's benefit year.

With respect to a benefit year commencing on or after July 1, 1995, if an individual does not have sufficient qualifying weeks or wages in his base year to qualify for benefits, the individual shall have the option of designating that his base year shall be the "alternative base year," which means the last four completed calendar quarters immediately preceding the individual's benefit year; except that, with respect to a benefit year commencing on or after October 1, 1995, if the individual also does not have sufficient qualifying weeks or wages in the last four completed calendar quarters immediately preceding his benefit year to qualify for benefits, "alternative base year" means the last three completed calendar quarters immediately preceding his benefit year and, of the calendar quarter in which the benefit year commences, the portion of the quarter which occurs before the commencing of the benefit year.

The division shall inform the individual of his options under this section as amended by P.L.1995, c. 234. If information regarding weeks and wages for the calendar quarter or quarters immediately preceding the benefit year is not available to the division from the regular quarterly reports of

wage information and the division is not able to obtain the information using other means pursuant to State or federal law, the division may base the determination of eligibility for benefits on the affidavit of an individual with respect to weeks and wages for that calendar quarter. The individual shall furnish payroll documentation, if available, in support of the affidavit. A determination of benefits based on an alternative base year shall be adjusted when the quarterly report of wage information from the employer is received if that information causes a change in the determination.

(2) With respect to a benefit year commencing on or after June 1, 1990 for an individual who immediately preceding the benefit year was subject to a disability compensable under the provisions of the "Temporary Disability Benefits Law," P.L.1948, c. 110 (C.43:21-25 *et seq.*), "base year" shall mean the first four of the last five completed calendar quarters immediately preceding the individual's period of disability, if the employment held by the individual immediately preceding the period of disability is no longer available at the conclusion of that period and the individual files a valid claim for unemployment benefits after the conclusion of that period. For the purposes of this paragraph, "period of disability" means the period defined as a period of disability by section 3 of the "Temporary Disability Benefits Law," P.L.1948, c. 110 (C.43:21-27). An individual who files a claim under the provisions of this paragraph (2) shall not be regarded as having left work voluntarily for the purposes of subsection (a) of R.S.43:21-5.

(3) With respect to a benefit year commencing on or after June 1, 1990 for an individual who immediately preceding the benefit year was subject to a disability compensable under the provisions of the workers' compensation law (chapter 15 of Title 34 of the Revised Statutes), "base year" shall mean the first four of the last five completed calendar quarters immediately preceding the individual's period of disability, if the period of disability was not longer than two years, if the employment held by the individual immediately preceding the

period of disability is no longer available at the conclusion of that period and if the individual files a valid claim for unemployment benefits after the conclusion of that period. For the purposes of this paragraph, "period of disability" means the period from the time at which the individual becomes unable to work because of the compensable disability until the time that the individual becomes able to resume work and continue work on a permanent basis. An individual who files a claim under the provisions of this paragraph (3) shall not be regarded as having left work voluntarily for the purposes of subsection (a) of R.S.43:21-5.

(d) "Benefit year" with respect to any individual means the 364 consecutive calendar days beginning with the day on, or as of, which he first files a valid claim for benefits, and thereafter beginning with the day on, or as of, which the individual next files a valid claim for benefits after the termination of his last preceding benefit year. Any claim for benefits made in accordance with subsection (a) of R.S.43:21-6 shall be deemed to be a "valid claim" for the purpose of this subsection if (1) he is unemployed for the week in which, or as of which, he files a claim for benefits; and (2) he has fulfilled the conditions imposed by subsection (e) of R.S.43:21-4.

. . .

(f) "Contributions" means the money payments to the State Unemployment Compensation Fund, required by R.S.43:21-7. "Payments in lieu of contributions" means the money payments to the State Unemployment Compensation Fund by employers electing or required to make payments in lieu of contributions, as provided in section 3 or section 4 of P.L.1971, c. 346 (C.43:21-7.2 or 43:21-7.3).

(h) "Employer" means:

. . .

(6) Any employing unit for which service in employment as defined in R.S.43:21-19(i)(1)(C) is performed after December 31, 1971 and which in either the current or the preceding calendar year paid remuneration for employment in the amount of $1,000.00 or more;

. . .

(i) (1) "Employment" means:

. . .

(C) Service performed after December 31, 1971 by an individual in the employ of a religious, charitable, educational, or other organization, which is excluded from "employment" as defined in the Federal Unemployment Tax Act, solely by reason of section 3306(c)(8) of that act,[5] if such service is not excluded from "employment" under paragraph (D) below.

. . .

(t) (1) . . .
(2) "Base week," commencing on or after January 1, 1996 and before January 1 2001, means:

(A) Any calendar week during which the individual earned in employment from an employer remuneration not less than an amount which is 20% of the Statewide average weekly remuneration defined in subsection (c) of R.S.43:21-3 which amount shall be adjusted to the next higher multiple of $1. 00 if not already a multiple thereof, except that if in any calendar week an individual subject to this subparagraph (A) is in employment with more than one employer, the individual may in that calendar week establish a base week with respect to each of the employers from whom the individual earns remuneration equal to not less than the amount defined in this subparagraph (A) during that week; or

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[5] 26 U.S.C.A. § 3306 *et seq.*

(B) If the individual does not establish in his base year 20 or more base weeks as defined in subparagraph (A) of this paragraph (2), any calendar week of an individual's base year during which the individual earned in employment from an employer remuneration not less than an amount 20 times the minimum wage in effect pursuant to section 5 of P.L.1966, c. 113 (C.34:11-56a4) on October 1 of the calendar year preceding the calendar year in which the benefit year commences, which amount shall be adjusted to the next higher multiple of $1.00 if not already a multiple thereof, except that if in any calendar week an individual subject to this subparagraph (B) is in employment with more than one employer, the individual may in that calendar week establish a base week with respect to each of the employers from whom the individual earns remuneration not less than the amount defined in this subparagraph (B) during that week.

. . .

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N.J.S.A. 43:21-48. Assessment of costs of administration

(a) If officers or employees of the Division of Employment Security perform duties in part related to the administration of this act and of the unemployment compensation law,[1] or if there be expenses otherwise incurred jointly in connection with administration of such acts, the division shall make an equitable apportionment to determine the portion of total expense to be charged to administration of this act including R.S. 43:21-4(f). So far as possible such apportionment shall be based upon records to be maintained with the respect to activities undertaken in administering this act.

(b) The Division of Employment Security shall, at the end of each fiscal year, determine the total amount expended by it for administrative cost directly attributable to the supervision

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[1] N.J.S.A. 43:21-1 *et seq.*

and operation of approved private plans, together with a proportionate part of the administrative cost of R.S. 43:21-4(f), and such total amount shall be prorated among the approved private plans in effect during that year on the basis of the total amount of taxable wages that were paid to all employees covered under such private plans. The prorated amounts shall be assessed against the respective employers but shall not exceed 1/20 of 1% of such wages, and such amounts shall be collectible by the division in the same manner as provided for the collection of employer contributions under the chapter to which this act is a supplement. In making this assessment, the division shall furnish to each affected employer a brief summary of the apportionment of expense to be charged to administration of this act, and of the facts upon which the calculation of the assessment is based. The amounts of such assessments shall be credited to the administration account.

(c) The division shall, at the end of each fiscal year, determine the total amount expended by it for administrative cost directly attributable to maintaining separate disability benefits accounts for employers required to contribute to the State disability benefits fund and assigning modified rates of contribution to such employers in accordance with the provisions of R.S. 43:21-7(e)(3). Such total amount of administrative costs shall be prorated among such employer accounts on the basis of the total amount of taxable wages paid to all employees during the preceding calendar year with respect to which contributions were payable to the State disability benefits fund. The prorated amounts shall be assessed against the respective employers, and such amounts shall be collectible by the division in the same manner as provided for the collection of employer contributions in R.S. 43:21-14. The amounts of such assessments shall be credited to the administration account.

STATEMENT Accompanying Assembly No. 2501
L. 1971, *c.* 346.

This bill conforms the New Jersey Unemployment Compensation Law to recent enactments of Congress dealing with the Federal-State program of unemployment insurance, and particularly the employment security amendments of 1970 (P.L. 91-373) and a 1968 amendment (P.L. 90-430) which extended from 10 to 15 years the period within which the State can use the "Reed Act" credits for administrative purposes. Most of the changes are required to become effective on January 1, 1972 to bring the New Jersey law in conformity with the Federal legislation.

The bill extends coverage to employees of State hospitals and institutions of higher education except the benefits based on service in institutional, research or principal administrative capacities between two successive academic terms or during periods of paid sabbatical leave. The bill provides coverage for nonprofit organizations and it affords political subdivisions of the State the opportunity to elect coverage. Financing in the public sector is on a reimbursement basis, and the nonprofit organizations are afforded a choice to elect to pay contributions or make reimbursement to the fund for benefits paid. The bill also provides coverage for American citizens who perform services outside the United States.

The tax base beginning January 1, 1972 is being raised from $3,600.00 to $4,200.00 to conform to the $4,200.00 tax base in the Federal Unemployment Tax Act (FUTA).

Section 12 of chapter 30 of the laws of 1967 which is being repealed by section 11 of this bill is now incorporated in R.S. 43:21-19(h)(i).

Supreme Court, U.S.
FILED
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No. 04-1487

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY, DEPARTMENT OF LABOR,

Petitioner,

v.

RECONSTITUTED COMMITTEE OF UNSECURED CREDITORS OF UNITED HEALTHCARE SYSTEM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant certiorari to consider whether the Court of Appeals for the Third Circuit – like the Court of Appeals for the First Circuit – (the only two Circuit Courts to address the issue) correctly held that a non-profit corporation's obligation, under unemployment compensation law, to reimburse the State for unemployment benefits paid to the non-profit's former employees, based on services rendered prior to the non-profit's bankruptcy petition, was not a "tax" "on a transaction" entitled to bankruptcy priority pursuant to 11 U.S.C. § 507(a)(8)(E)?

STATEMENT UNDER SUP. CT. R. 29.6

The respondent in this matter, the Reconstituted Committee of Unsecured Creditors of United Healthcare System, Inc. ("Committee"), is not a corporation. Its members are (i) JNESO, District Counsel 1, IUOE, AFL-CIO, (ii) Horizon Blue Cross Blue Shield of New Jersey, and (iii) PSE&G.

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STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The following are in addition to the statutory provisions set forth in the Petition:

1. N.J.S.A. 43:21-7(c)(5). Contributions; Respondent's Appendix ("Resp. App.") 1a-4a.

2. S. Rep. No. 91-752, 91st Cong., 2nd Session, *reprinted in* 1970 U.S.C.C.A.N. 3606, 3617-19; Resp. App. 5a-6a.

STATEMENT OF THE CASE

A. Background.

The principal facts in this matter are not in dispute. United Healthcare System, Inc. ("United") filed a petition for reorganization under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") on February 19, 1997 (the "Filing Date"). Pre-petition, United was a non-profit corporation which had been designated The Children's Hospital of New Jersey and provided hospital and healthcare services to Newark, Orange and Irvington, New Jersey. Within forty-eight (48) hours after United filed its bankruptcy petition, United ceased providing healthcare services and either discharged its patients to their homes or transferred them to other healthcare facilities. Three weeks later, on March 8, 1997, United terminated the bulk of its employees who then applied to the New Jersey Department of Labor ("DOL") for unemployment compensation benefits.

B. New Jersey's Unemployment Compensation Law.

Most New Jersey employers are contributory employers under New Jersey unemployment compensation law and are required to make unemployment, disability and healthcare tax payments to DOL on a quarterly basis calculated as a percentage of the wages paid by the employer to its employees. *See* N.J.S.A. 43:21-7; Appendix to Petition for a Writ of Certiorari ("Pet. App.") 72-79. As a non-profit corporation, however, United was entitled, in lieu of paying quarterly taxes to DOL, to elect to pay DOL solely a reimbursement charge for any unemployment benefits DOL ultimately paid to United's former employees (the "Reimbursement Obligation"). *See* N.J.S.A. 43:21-7.2; Pet. App. 79-86. United made such an election in 1972 and reimbursed DOL for unemployment benefits DOL paid to its former employees until United filed for bankruptcy protection in 1997.

C. DOL's Reimbursement Claims and the Committee's Objections.

DOL filed proofs of claims in United's bankruptcy case totaling $9,458,597.89 which arise primarily from the unemployment benefits DOL paid to United's former employees. Specifically, DOL filed an administrative claim totaling $8,302,427.84 consisting of (i) a "Reimbursement Obligation" of $6,240,640.36 and related interest of $1,982,520.58 for unemployment benefits DOL paid to United's former employees after the Filing Date and (ii) a "Contribution Claim" of $79,266.90 consisting of the quarterly tax levied against United as a contributory employer based on a percentage of the wages United paid to its employees on and after the Filing Date (the "Administrative

Claim").[1] Petition for a Writ of Certiorari ("Petition") at 5. DOL also filed a priority claim for a "Reimbursement Obligation" of $932,704.37 and related interest of $8,597.93 for unemployment benefits DOL paid to United's former employees prior to the Filing Date (the "Priority Claim"). Petition at 5.

The Committee's predecessor, the Official Committee of Unsecured Creditors of Creditors of United Healthcare Inc.,[2] objected to the Administrative Claim and the Priority Claim on various grounds as part of an omnibus claims objection motion. DOL opposed this objection and, following discovery, the parties submitted briefs, affidavits and deposition transcripts regarding the objections to the DOL claims. In a reported decision, the United States Bankruptcy Court for the District of New Jersey (the "Bankruptcy Court") rejected some of DOL's arguments as to the priority of its claims, but accepted others. Pet. App. 38.

D. DOL's Claim for Administrative Priority Under 11 U.S.C. §§ 507(a)(1) and 503(b).

DOL claimed administrative priority under 11 U.S.C. §§ 507(a)(1) and 503(b) for the Reimbursement Obligation included in the Administrative Claim solely because DOL paid unemployment benefits to United's former employees

1. After United filed its bankruptcy petition, DOL no longer considered United a non-profit employer and required United to pay quarterly employment taxes based on a percentage of the wages United paid its employees. Petition at 5.

2. Following confirmation of United's plan of reorganization, the Committee was authorized to pursue these objections to the DOL's proofs of claim.

post-petition. The Bankruptcy Court rejected DOL's claim of administrative priority.

The Bankruptcy Court held that only taxes "incurred by the estate" post-petition can be classified as administrative claims under 11 U.S.C. § 503(b)(1)(B). Pet. App. 56. The Bankruptcy Court further concluded that "all of the employment on which the reimbursement charges are based occurred in the pre-petition period." Pet. App. 56.[3] Thus, the Bankruptcy Court held that the Reimbursement Obligation included in the Administrative Claim was not entitled to administrative priority because it was not "incurred post-petition" or based on a transaction with United as the debtor-in-possession. Neither United nor DOL challenged this holding on appeal.

---

3. By statute, unemployment benefits are calculated upon a "base year" which consists of "the first four of the last five completed calendar quarters immediately preceding an individual's benefit year." N.J.S.A. 43:21-19(c)(1); Pet. App. 91. "Benefit year" with respect to an individual is defined as

> the 364 consecutive calendar days beginning with the day on, or as of, which he first files a valid claim for benefits, and thereafter beginning with the day on, or as of, which the individual next files a valid claim for benefits after the termination of his last preceding benefit year.

N.J.S.A. § 43:21-19(d); Pet. App. 93. As the Bankruptcy Court determined, since the bulk of United's employees were terminated on March 8, 1997 and applied for unemployment compensation on March 9, 1997, the "base year" for the vast majority of the former employees was the fourth quarter of 1995, and the first, second and third quarters of 1996, all of which occurred prior to the Filing Date. Pet. App. 41.

E. DOL's Claim for "Tax" Priority as an Employment Tax Under 11 U.S.C. § 507(a)(8)(D).

As a fallback to its claim of administrative priority, DOL also argued that the Reimbursement Obligation included in the Administrative Claim as well as the Reimbursement Obligation included in the Priority Claim (together, the "Reimbursement Claims") were entitled to priority as an employment tax on wages pursuant to 11 U.S.C. § 507(a)(8)(D). The Bankruptcy Court rejected this argument and determined that the Reimbursement Claims were not entitled to priority under Bankruptcy Code § 507(a)(8)(D) because the Reimbursement Claims were not a levy on the wages United paid to its employees:

> [T]he reimbursement charges sought by [DOL] are not entitled to priority under section 507(a)(8)(D) because they are not levied on wages, salaries, or commissions, but result instead from the amount of benefits paid to former employees under N.J.S.A. 43:21-7.2. The reimbursement charges are removed in time from the payment of wages, in that they are based on benefits paid only after unemployment occurs and the employee qualifies for benefits. There is no immediate connection between the wage earned and the benefits paid. To grant priority to the DOL's reimbursement claim as an employment tax would serve to expand the narrowly defined priority given to employment taxes under the Code.

Pet. App. 54-55. Neither United nor DOL challenged this holding on appeal.

F. DOL's Claim for "Tax" Priority as an Excise Tax Under 11 U.S.C. § 507(a)(8)(E).

Alternatively, DOL argued that the Reimbursement Claims were entitled to priority as an "excise tax on . . . a transaction occurring during the three years immediately preceding the date of the filing of the petition . . ." pursuant to 11 U.S.C. § 507(a)(8)(E).[4] The Bankruptcy Court ultimately accepted this argument by DOL. Pet. App. 54. The Committee appealed this holding of the Bankruptcy Court to the United States District Court for the District of New Jersey (the "District Court") which affirmed without an opinion in an unpublished order. The Committee then appealed the decision of the District Court to the Third Circuit, which reversed the District Court Order. (Pet. App. 1.) It is this decision as to which DOL petitions for certiorari before this Court.

---

4. Section 507(a)(8)(E) specifically provides:

> The following expenses and claims have priority in the following order: . . . (8) Eighth, allowed claims of governmental units, only to the extent, that such claims are for . . . (E) an excise tax on - (i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or (ii) if a return is not required, ***a transaction occurring during the three years immediately preceding the date of the filing of the petition.***

11 U.S.C. § 507(a)(8)(E) (emphasis added); Pet. App. 58-59.

G. The Third Circuit's Decision.

The Third Circuit held that the Reimbursement Obligation was not a tax. Pet. App. 19, 24. Following this Court's directive in *United States v. Reorganized CF&I Fabricators*, 518 U.S. 213 (1996), the Third Circuit undertook a "functional examination" of the Reimbursement Obligation. Pet. App. 19, 24. The Third Circuit determined that the Reimbursement Obligation was distinct from the unemployment tax on wages paid by contributory employers. Pet. App. 20, 22, 23. Because the Reimbursement Obligation only repaid DOL for unemployment benefits DOL paid to United's former employees and was not a levy assessed on United to support the general costs of New Jersey's unemployment compensation system, the Third Circuit, like the First Circuit before it, concluded that the Reimbursement Obligation did not operate as a "tax," Pet. App. 19, 24, and, thus, was not entitled to priority under Bankruptcy Code § 507(a)(8)(E). Pet. App. 24.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT IN THE CIRCUITS JUSTIFYING THE PETITION.

Sup. Ct. R. 10 states that "a writ of certiorari will be granted only for compelling reasons." A principal "compelling reason" is "whether a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . ." Sup. Ct. R. 10(a).[5]

5. A circuit split exists only where federal courts of appeals have arrived at contrary holdings. *See, e.g., Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 n.2 (2002) (resolving "a ***split*** among the Courts of Appeals concerning the proper pleading standard for (Cont'd)

DOL cannot show any conflict between the only two United States courts of appeal to address the bankruptcy priority of reimbursement obligations under the unemployment compensation laws. Both the Third Circuit in this case and the United States Court of Appeals for the First Circuit in *Massachusetts Division of Employment & Training v. Boston Regional Medical Center, Inc. (In re Boston Regional Medical Center, Inc.)*, 291 F.3d 111 (1st Cir. 2002) ("*Boston Regional I*") reached the same conclusion: that a non-profit employer's Reimbursement Obligation is not a tax.

A. The Third Circuit and the First Circuit Both Determined that a Non-Profit Employer's Reimbursement Obligation is not a "Tax".

The Third Circuit decided that United's Reimbursement Obligation under New Jersey's unemployment compensation law was not a tax for bankruptcy purposes. Pet. App. 19, 24. The United States Court of Appeals for the First Circuit, the only other federal circuit court to consider this issue, reached exactly the same result when it addressed whether a non-profit hospital's Reimbursement Obligation under

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(Cont'd)
employment discrimination cases" wherein a "majority of Courts of Appeals have ***held*** that a plaintiff need not plead a prima facie case of discrimination . . ." yet the Second Circuit "***held*** that the petitioner had failed to meet his burden because his allegations were insufficient as a matter of law to raise an inference of discrimination") (emphasis added); *United States v. Texas*, 507 U.S. 529, 533 n.3 (1993) (acknowledging "a ***split*** among the Courts of Appeals" wherein "[t]he Tenth Circuit ***holds*** that the Debt Collection Act of 1982 did not abrogate the Federal Government's common-law right to collect prejudgment interest against the States" while "[t]he Second, Third, and Eighth Circuits all ***hold*** to the contrary") (emphasis added).

Massachusetts unemployment compensation law was a tax for bankruptcy purposes. *Boston Regional I*, 291 F.3d at 124.

Like New Jersey's unemployment compensation law, Massachusetts' unemployment compensation law was dictated by the Federal-State Unemployment Tax Act, codified at 26 U.S.C. § 3301 *et seq.* ("FUTA"). As required by FUTA, the Massachusetts statute provided non-profit employers with the option to opt out of the contributory tax on wages and to elect solely to reimburse the state for any unemployment benefits it actually paid to the non-profit's employees. *Boston Regional I*, 291 F.3d at 115 ("Nonprofit employers have the option instead to make 'payments in lieu of contributions,' reimbursing the fund after the fact for benefits paid to their former employees.") (citing Mass. Gen. Laws. Ch. 151A, § 14A).

After undertaking the "functional examination" required by *CF&I*, the First Circuit concluded that this Reimbursement Obligation was not a tax:

> [W]e must examine the functions of the law that imposes the obligations rather than the label given the obligation. . . .
>
> * * *
>
> We hold that payments in lieu are not taxes within the meaning of § 507(a)(8).

Boston Regional I, 291 F.3d at 120, 124 (internal citations omitted).

The Third Circuit undertook the same functional examination and reached the same result:

> After making an independent analysis predicated on a functional examination such as that applied in *CF&I Fabricators*, we have determined that United's obligation to reimburse [DOL] for unemployment compensation benefits is not a tax for bankruptcy purposes.

Pet. App. 19.

B. DOL's Reliance on Federal Circuit Court Decisions Involving Statutes, Other than Unemployment Compensation Statutes, is Misplaced and Misleading.

In a futile attempt to avoid the unity between the First Circuit and the Third Circuit decisions, which are the only two courts to address whether the Reimbursement Obligation was a tax, DOL spends considerable time discussing decisions which involve payment obligations not under any unemployment compensation statute, but under different statutory schemes such as: (i) workers' compensation statutes, *Ohio Board of Workers Compensation v. Yoder (In re Suburban Motor Freight, Inc.)*, 36 F.3d 484 (6th Cir. 1994) ("*Suburban II*"), *Industrial Commission v. Camilli (In re Camilli)*, 94 F.3d 1330 (9th Cir. 1996), and *George v. Uninsured Employers Fund (In re George)*, 361 F.3d 1157 (9th Cir. 2004), (ii) "charity care" statutes, *In re Boston Regional Medical Center, Inc. v. Massachusetts Division of Health Care Finance & Policy (In re Boston Regional Medical Center, Inc.)*, 365 F.3d 51 (1st Cir. 2004) ("*Boston Regional II*"), and (iii) sewer use statutes, *County Sanitation*

District No. 2 v. Lorber Industries (In re Lorber Industries), 675 F.2d 1062 (9th Cir. 1982). Since these decisions involve wholly-different statutes and schemes of compensation, they fail to demonstrate any split among the circuits as to whether the Reimbursement Obligation under the unemployment compensation law is a tax entitled to priority treatment under the Bankruptcy Code.

1. Workers' Compensation Statutes

Suburban II, *Camilli* and *George* involved workers' compensation statutes. These statutes permitted employers to pay state premiums, self-insure or provide insurance to cover their workers' compensation claims. *Suburban II*, 36 F.3d at 486; *Camilli*, 94 F.3d at 1332; *George*, 361 F.3d at 1159. They further required the state to pay the injured worker if the employer failed to do so. In each case, the employer failed to insure, self-insure and/or pay the employee, so the state paid the claims and sought reimbursement from the defaulting employer. *Suburban II*, 36 F.3d at 486; *Camilli*, 94 F.3d at 1332; *George*, 361 F.3d at 1159. Because these cases do not involve the unemployment compensation statutes in issue here, they do not conflict with the decisions of the First and Third Circuits in determining that the Reimbursement Obligation is not a tax.[6]

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6. Even if these workers' compensation reimbursement cases were sufficiently analogous to the Reimbursement Obligation in the unemployment compensation statutes at issue here and in *Boston Regional I*, they demonstrate no split in the circuits. Like the Third Circuit here and the First Circuit in *Boston Regional I*, the Sixth Circuit in *Suburban II* concluded that the reimbursement obligation under the workers' compensation law was ***not a tax***. *Suburban II*, 36 F.3d at 489. The Ninth Circuit reached the same conclusion in *George*. *George*, 361 F.3d at 1162. Only the Ninth Circuit's earlier decision in *Camilli* reached a different result. *Camilli*, 94 F.3d at 1334.

2. Other Statutes.

a. Charity Care Statute.

Boston Regional II and *Lorber* involved even more distinct payment obligations. *Boston Regional II* involved a statute which assessed charges to equalize the disproportionate burden of providing "charity" emergency room care to indigent patients between hospitals located in poor urban areas and hospitals in less economically-distressed areas. *Boston Regional II*, 365 F.3d at 53. In *Boston Regional II*, the First Circuit found the "charity care" obligation under this statute was a tax. *Boston Regional II*, 365 F.3d at 63.

b. Sewer Use Statutes.

Lorber involved fees which a municipality imposed on its residents for the use of the municipal sewer system. *Lorber*, 675 F.2d at 1064-65. *Lorber* found the sewer charges not to be a tax because they conferred a direct benefit on the parties obligated to pay the charges. *Lorber*, 675 F.2d at 1067.

Because the Third Circuit's decision is consistent with the only other circuit court to actually address the Reimbursement Obligation within the context of an unemployment compensation statute, and because the other cases cited by DOL did not involve a Reimbursement Obligation under FUTA or any State unemployment compensation statute, there is no foundation to conclude that there is a split among the Federal circuits' holdings on this issue or to grant the Petition on this basis.

II. THE THIRD CIRCUIT DID NOT DEPART FROM THIS COURT'S PRECEDENT, RATHER IT PROPERLY APPLIED THE "FUNCTIONAL EXAMINATION" THAT THIS COURT ESTABLISHED IN *CF&I*, IN DETERMINING THAT THE REIMBURSEMENT OBLIGATION WAS NOT A TAX.

DOL has also failed to establish that "a United States court of appeals has decided an important question in a way which conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The Third Circuit's decision does not conflict with a decision of this Court. To the contrary, the Third Circuit's functional examination is wholly consistent with, and in furtherance of, this Court's most recent decision on "what is a tax". *United States v. Reorganized CF&I Fabricators*, 518 U.S. 213, 224-26 (1996).

A. This Court's Precedent Mandates a Functional Examination to Determine if an Obligation is a Tax Entitled to Priority under the Bankruptcy Code.

In *CF&I*, this Court prescribed a "functional examination" to determine if an obligation is a tax:

> On a number of occasions, this Court considered whether a particular exaction, whether or not called a "tax" in the statute creating it, was a tax for purpose of § 64(a) [the predecessor to 11 U.S.C. § 507(a)(8) in the Bankruptcy Act], and in every one of those cases the Court looked behind the label placed on the exaction and rested its answer directly on the operation of the provision using the term in question.
>
> * * *

> [W]e conclude that the 1978 Act reveals no congressional intent to reject generally the interpretive principle that characterizations in the [relevant statute] are not dispositive . . . , and no specific provision that would relieve us from making a functional examination of [the statute in issue].

CF&I, 518 U.S. at 220, 224.

In performing this examination, the Court in *CF&I* first examined the language of the statute, 26 U.S.C. § 4971 (§ 4971), to ascertain the characteristics of the charge in issue. *CF&I*, 518 U.S. at 224. After focusing on the statutory language and case law interpreting § 4971, *CF&I* also examined the statute's legislative history and concluded that all three sources demonstrated the punitive, non-tax nature of the charge. *Id.* at 226 (citing H.R. Rep. No. 93-807, at 28 (1974)).

Based on this functional examination, *CF&I* concluded that the applicable provision was a penalty and not a tax:

> [g]iven the patently punitive function of § 4971, . . . § 4971 must be treated as imposing a penalty, not authorizing a tax. Accordingly, we hold that the 'tax' under § 4971(a) was not entitled to seventh priority as an 'excise tax' under § 507(a)(7)(E), but instead is, for bankruptcy purposes, a penalty to be dealt with as an ordinary, unsecured claim.

Id.

B. As Directed by *CF&I*, the Third Circuit Performed a Functional Examination of United's Reimbursement Obligation to Determine if it Constituted a Tax under New Jersey's Unemployment Compensation Statute.

Following the procedure dictated by the Supreme Court in *CF&I*, the Third Circuit made an independent analysis to determine whether the Reimbursement Obligation was a tax. Pet. App. 19.

The Third Circuit began by reviewing the statutory scheme which, in this case, includes both FUTA and the provisions of New Jersey law implementing FUTA. It also confirmed the purpose of the statute's provisions as explicated in the applicable legislative history. It then determined that the Reimbursement Obligation did not function as a tax.

The Third Circuit noted that the New Jersey statute giving rise to United's obligation allowed United to elect, in lieu of paying a contributory tax on wages, "to reimburse [DOL] for any unemployment compensation benefits [DOL] actually paid to former United employees." Pet. App. 5 (citing N.J.S.A. 43:21-7.2). The Third Circuit noted that this was consistent with FUTA which exempted nonprofit employers from paying federal contributory taxes on wages. Pet. App. 6 (citing 26 U.S.C. § 3306(c)(8)). The Third Circuit also confirmed that this was consistent with the legislative history underlying both FUTA and the New Jersey act conforming New Jersey law to FUTA's 1970 amendments. Both the express language of the statute and the legislative history interpreting it allowed a non-profit employer to opt out from the contributory tax on wages so that it could insulate itself

from the general costs of providing unemployment benefits to all employees in the unemployment compensation system. Pet. App. 21. *Accord* S. Rep. No. 91-752, 91st Cong., 2nd Session, *reprinted in* 1970 U.S.C.C.A.N. 3606, 3617-18; Resp. App. 5a-6a.[7]

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7. The Senate Report on the 1970 amendment noted the desire both (a) to avoid taxing non-profit employers and (b) to exclude non-profit employers from subsidizing unemployment benefits provided to employees in the for-profit sector:

> Under existing Federal law, services performed for non-profit religious, charitable, educational and humane organizations and for a State and its political subdivisions are exempt from the tax provisions of the Federal Unemployment Tax Act. There has not, therefore, been a tax-credit incentive for covering employees of these organizations and governments for unemployment compensation purposes. While employment in these organizations and governments is not subject to fluctuations to the same degree as in commerce and industry, unemployment affects a substantial number of their employees, particularly people working in non-professional occupations.
>
> ***The committee does not want to change the present tax status of non-profit organizations***, but is concerned about the need of their employees for protection against wage loss resulting from unemployment.
>
> * * *
>
> ***The States would be required also to provide non-profit organizations with the option of reimbursing the State*** for unemployment compensation payments attributable to service with the organization ***in lieu of paying contributions under the normal tax provisions of the State law***. In effect, the non-profit organizations would be allowed to adopt a form of self-insurance. Under the reimbursement method of financing, a non-profit organization whose workers

(Cont'd)

The Third Circuit emphasized that United's Reimbursement Obligation was distinct from the contributory taxes which all for-profit employers pay as a percentage of their payrolls. Pet. App. 20 (noting that "New Jersey law . . . except[s] non-profit employers . . . from the contribution obligation section 43:21-7.2 creates.").

In determining the function of the Reimbursement Obligation, the Third Circuit noted that a tax was a charge assessed to generally fund the costs of providing a governmental program, like the unemployment compensation system. Pet. App. 9 (citing *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906)) & 21. But the Third Circuit emphasized that "[o]ne major characteristic of the reimbursement obligation is that payments in lieu of contributions reimburse DOL for unemployment benefits actually paid and do not raise funds to support a general governmental undertaking." Pet. App. 21.[8] This led the Third Circuit to conclude that "rather than a tax,

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(Cont'd)

> experienced no compensated unemployment in a year would have no unemployment insurance costs for that year. ***The committee considers it appropriate that these organizations, which are often dependent upon charitable contributions, should not be required to share in the costs of providing benefits to workers in profit-making enterprises.***

S. Rep. No. 91-752, 91st Cong., 2nd Session, *reprinted in* 1970 U.S.C.C.A.N. 3606, 3617-18; Resp. App. 5a-6a. (emphasis added).

8. DOL concedes in its Petition that the Reimbursement Obligation did not contribute to the administrative costs or the solvency of New Jersey's unemployment compensation system. Petition at 4 (citing N.J.S.A. 43:21-7(e); 43:21-48). *Accord* N.J.S.A. 43:21-7(c)(5); Resp. App. 1a-4a.

the reimbursement obligation is more like a promise in exchange for [a] privilege. . . ." Pet. App. 22.

The Third Circuit also applied this Court's decision in *National Cable Television Association v. United States*, 415 U.S. 336 (1974). Although decided before *CF&I*, this case similarly employed a functional examination to determine whether the charge was a tax. *Nat'l Cable*, 415 U.S. at 341-42. *National Cable*'s functional examination explored the extent that the obligation was related to a benefit the government provided to the person paying the assessed charge and the extent that the government could manipulate the assessment. Pet. App. 23 (citing *Nat'l Cable*, 415 U.S. at 340-41).

In summary, the Third Circuit found that the Reimbursement Obligation was not a tax because (i) "the reimbursement obligation directly is linked to the benefits paid"; (ii) "the State cannot manipulate a reimbursement obligation to encourage or discourage certain activity"; and (iii) "the government pays out benefits and the non-profit employer simply refills the government coffers." Pet. App. 23.

Because the Third Circuit properly applied the functional examination directed by this Court, there is no basis for granting the Petition.

III. THIS CASE INVOLVES NO IMPORTANT, UNRESOLVED FEDERAL QUESTION WHICH THIS COURT SHOULD ADDRESS.

The Third Circuit did not address "an important question of Federal law that has not been, but should be, decided by this Court" which could provide a "compelling reasons" to grant DOL's Petition. Sup. Ct. R. 10(c). The question of "what is a tax?" has repeatedly been addressed by this Court. Beyond this,

the FUTA statute clearly mandates that the States allow non-profit employers to opt out of the contributory tax on wages and to elect a reimbursement obligation in lieu of the contributory tax. The clarity of this statutory scheme needs no further illumination from this Court. Further, this issue arises in limited factual circumstances only after an electing non-profit corporation files for bankruptcy and the Third Circuit's ruling is consistent with the necessarily-narrow construction of bankruptcy statutes to restrict priority treatment of claims in bankruptcy cases. Finally, DOL overstates the impact of the Third Circuit's ruling on its monetary recovery in this case and under the Bankruptcy Code in general.

A. This Court Has Already Explained How to Determine What is a Tax.

The broad issue which DOL presents to this Court, "what is a tax?", already has been addressed by this Court in *CF&I* and numerous cases preceding it. *United States v. Reorganized CF&I Fabricators*, 518 U.S. 213 (1996); *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974); *City of New York v. Feiring*, 313 U.S. 283 (1941); *New Jersey v. Anderson*, 203 U.S. 483 (1906). In *CF&I*, this Court laid out the "functional examination" applied by the Third Circuit. The Third Circuit and the First Circuit recently harmonized *CF&I* with the decisions of other circuit courts in *Lorber* and *Suburban II* by construing the factors enumerated there as elements to consider in performing *CF&I*'s functional examination.[9] Pet. App. 14-15; *Boston*

9. Significantly, both *Lorber* and *Suburban II*, which DOL claims is the well-spring of the confusion it asks this Court to resolve, were decided before this Court's decision in *CF&I*. Since *CF&I* did not disavow the analysis in these cases, there is no basis to revisit *Lorber* and *Suburban II* now.

Regional I, 291 F.3d at 121 n.10. The federal circuit courts have readily applied these factors in determining the function of various obligations and this application does not require further explication by this Court.

B. The Decisions of the First and Third Circuits are in Accord with FUTA.

The FUTA scheme expressly mandates the States to provide non-profit employers with the election to pay a reimbursement obligation in lieu of the contributory tax on wages. 26 U.S.C. § 3309; Pet. App. 64-65. *Accord* S. Rep. No. 91-752, 91st Cong., 2nd Session, *reprinted in* 1970 U.S.C.C.A.N. 3606, 3617-18; Resp. App. 5a-6a; N.J. Laws of 1971, Chapter 346, Bill No. A2501 at 47-48; Pet. App. 97. It is not this Court's role (or the role of any court) to second-guess the clearly-expressed intent of the legislature. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("When the statute's language is plain, the sole function of the Court . . . is to enforce it according to its terms."). *Accord Conn. Nat'l Bank v. Germain*, 502 U.S. 249, 253-54 (1992).

Additionally, the Third Circuit's decision is not only consistent with FUTA, it is also consistent with another important Federal policy expressed in the Bankruptcy Code, which requires priorities in bankruptcy to be narrowly construed. *See Suburban II*, 36 F.3d at 487 ("'[e]quality of distribution among creditors is a central policy of the Bankruptcy Code'. . . . Thus, priority claims must be carefully limited since every such claim reduces the fund available to general creditors.") (citations omitted). *Accord In re Metro Transp. Co.*, 117 B.R. 143, 154 (Bankr. E.D. Pa. 1990) ("[T]here is a presumption in bankruptcy cases . . . that the debtor's limited resources will be equally distributed among his creditors [causing] statutory priorities [to be] narrowly construed.").

C. The Third Circuit's Decision does not Threaten to Undermine New Jersey's Unemployment Compensation System

DOL's own Petition contradicts its extensive argument that the solvency of New Jersey's unemployment compensation system is threatened by the Third Circuit's decision. (Petition at 21-24). DOL admits that only contributory employers are obligated to pay for the administration and solvency of the system. Petition at 4 (citing N.J.S.A. 43:21-7(e) and 43:21-48). *Cf.* N.J.S.A. 43:21-7(c)(5); Resp. App. 1a-4a. (protecting the solvency of the system through the rates paid by contributory employees as a percentage of wages). Since non-profit employers only reimburse DOL for benefits actually paid to their own employees, these payments are not designed to support the administration or solvency of the unemployment compensation system.[10]

DOL further overstates the precedential impact of the Third Circuit's decision. It involved only a narrow element (a reimbursement obligation vs. a contributory tax on wages) of a broader system (unemployment compensation law) in the context of a bankruptcy case. As a result, it only applies to electing non-profit employers in the bankruptcy system; it applies only if the electing non-profit employer terminates employees just prior to or just after the electing non-profit employer files for bankruptcy protection; and it only applies in determining whether the claim will be treated as a priority

10. Nor should they. An important element of the FUTA legislative scheme is that non-profit employers do not cover the losses of contributory employers in the for-profit sector. *Accord* S. Rep. No. 91-752, 91st Cong., 2nd Session, *reprinted in* 1970 U.S.C.C.A.N. 3606, 3618; Resp. App. 5a-6a. (quoted in n.7 *supra*).

versus general unsecured claim in the bankruptcy case. This narrow situation of limited circumstances is not sufficient to justify this Court exercising its jurisdiction here.

Finally, DOL also overstates the financial impact of the Third Circuit's decision on it. Just because United's Reimbursement Obligation did not garner priority treatment in United's bankruptcy case, does not mean that DOL's Reimbursement Claims will not be paid. Rather, consistent with the Federal policy of equality of distributions to creditors and the resulting, narrow construction of priority claims, the Reimbursement Claims will be treated as general unsecured claims in United's bankruptcy case and will be treated like all other non-priority creditors.

In this case, contrary to DOL's assertion in the Petition, DOL will not lose its entire claim. Rather, it will retain a general unsecured claim of over $7,000,000.[11] United's general unsecured creditors have already received a partial distribution of fifteen percent (15%), which the DOL will similarly receive, and are slated for an additional distribution upon final resolution of the DOL's claim. If the Third Circuit's decision stands, unsecured creditors, including DOL, will receive an additional distribution of approximately twenty percent (20%) for a total recovery of almost thirty-five percent (35%) of their unsecured claims.

Under these circumstances, there is no important and unresolved Federal question which this Court should address.

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11. The Committee has reserved the right to challenge the mathematical accuracy of DOL's calculation of its claim, but the parties agreed to defer this issue until the priority status of the claim finally has been resolved.

IV. DOL DOES NOT EVEN ARGUE THAT ANY OF THE OTHER ENUMERATED REASONS FOR GRANTING A PETITION FOR CERTIORARI ARE PERSENT HERE.

DOL has not raised any other grounds for granting its petition for certiorari and, in fact, none apply. The Third Circuit's decision does not conflict with a decision by a state court of last resort. Sup. Ct. R. 10(a). The Third Circuit has not departed from the accepted and usual course of proceedings or sanctioned such a departure by a lower court. Sup. Ct. R. 10(a). To the contrary, the Third Circuit simply disagreed with the lower courts' legal conclusions.

CONCLUSION

DOL's Petition for a Writ of Certiorari should be denied because: (1) there is no split between the Third Circuit's decision and any other circuit court decision; (2) the Third Circuit's decision is consistent with, and properly applied, the applicable decisions of this Court; (3) the Third Circuit's decision involves no compelling question which is unresolved by this Court; and (4) there is no other ground for granting the Petition.

Respectfully submitted,

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APPENDIX

§ 43:21-7 Contributions.

Employers other than governmental entities, whose benefit financing provisions are set forth in section 4 of P.L. 1971, c. 346 (C. 43:21-7.3), and those nonprofit organizations liable for payment in lieu of contributions on the basis set forth in section 3 of P.L. 1971, c. 346 (C. 43:21-7.2), shall pay to the controller for the unemployment compensation fund, contributions as set forth in subsections (a), (b) and (c) hereof, and the provisions of subsections (d) and (e) shall be applicable to all employers, consistent with the provisions of the "unemployment compensation law" and the "Temporary Disability Benefits Law," P.L. 1948, c. 110 (C. 43:21-25 et seq.).

* * *

(c) Future rates based on benefit experience.

* * *

(5) (A) Unemployment Trust Fund Reserve Ratio. If on March 31 of any calendar year the balance in the unemployment trust fund equals or exceeds 4% but is less than 7% of the total taxable wages reported to the controller as of that date in respect to employment during the preceding calendar year, the contribution rate, effective July 1 following, of each employer eligible for a contribution rate calculation based upon benefit experience, shall

be increased by 3/10 of 1% over the contribution rate otherwise established under the provisions of paragraph (3) or (4) of this subsection. If on March 31 of any calendar year the balance of the unemployment trust fund exceeds 2 1/2% but is less than 4% of the total taxable wages reported to the controller as of that date in respect to employment during the preceding calendar year, the contribution rate, effective July 1 following, of each employer eligible for a contribution rate calculation based upon benefit experience, shall be increased by 6/10 of 1% over the contribution rate otherwise established under the provisions of paragraph (3) or (4) of this subsection.

If on March 31 of any calendar year the balance of the unemployment trust fund is less than 2 1/2% of the total taxable wages reported to the controller as of that date in respect to employment during the preceding calendar year, the contribution rate, effective July 1 following, of each employer (1) eligible for a contribution rate calculation based upon benefit experience, shall be increased by (i) 6/10 of 1% over the contribution rate otherwise established under the provisions of paragraph (3), (4)(A) or (4)(B) of this subsection, and (ii) an additional amount equal to 20% of the total rate established herein, provided, however, that the final contribution rate for each employer shall be computed to the nearest multiple of 1/10% if not already a multiple thereof; (2) not eligible for a contribution rate

calculation based upon benefit experience, shall be increased by 6/10 of 1% over the contribution rate otherwise established under the provisions of paragraph (4) of this subsection. For the period commencing July 1, 1984 and ending June 30, 1986, the contribution rate for each employer liable to pay contributions under R.S. 43:21-7 shall be increased by a factor of 10% computed to the nearest multiple of 1/10% if not already a multiple thereof.

(B) If on March 31 of any calendar year the balance in the unemployment trust fund equals or exceeds 10% but is less than 12 1/2% of the total taxable wages reported to the controller as of that date in respect to employment during the preceding calendar year, the contribution rate, effective July 1 following, of each employer eligible for a contribution rate calculation based upon benefit experience, shall be reduced by 3/10 of 1% under the contribution rate otherwise established under the provisions of paragraphs (3) and (4) of this subsection; provided that in no event shall the contribution rate of any employer be reduced to less than 4/10 of 1%. If on March 31 of any calendar year the balance in the unemployment trust fund equals or exceeds 12 1/2% of the total taxable wages reported to the controller as of that date in respect to employment during the preceding calendar year, the contribution rate, effective July 1 following, of each employer eligible for a contribution rate

calculation based upon benefit experience, shall be reduced by 6/10 of 1% if his account for all past periods reflects an excess of contributions paid over total benefits charged of 3% or more of his average annual payroll, otherwise by 3/10 of 1% under the contribution rate otherwise established under the provisions of paragraphs (3) and (4) of this subsection; provided that in no event shall the contribution rate of any employer be reduced to less than 4/10 of 1%.

(C) The "balance" in the unemployment trust fund, as the term is used in subparagraphs (A) and (B) above, shall not include moneys credited to the State's account under section 903 of the Social Security Act, as amended (42 U.S.C. § 1103), during any period in which such moneys are appropriated for the payment of expenses incurred in the administration of the "unemployment compensation law."

(D) Prior to July 1 of each calendar year the controller shall determine the Unemployment Trust Reserve Ratio, which shall be calculated by dividing the balance of the unemployment trust fund as of the prior March 31 by total taxable wages reported to the controller by all employers as of March 31 with respect to their employment during the last calendar year.

* * * *

Appendix

S. Rep. No. 91-752, 91st Cong., 2nd Session, *reprinted in* 1970 U.S.C.C.A.N. 3606, 3617-19.

4. State law coverage of employees of nonprofit organizations and of state hospitals and institutions of higher education.

Present law.

Under existing federal law, services performed for non-profit religious, charitable, educational and humane organizations and for a state and its political subdivisions are exempt from the tax provisions of the federal unemployment tax act. There has not, therefore, been a tax-credit incentive for covering employees of these organizations and governments for unemployment compensation purposes. While employment in these organizations and governments is not subject to fluctuations to the same degree as in commerce and industry, unemployment affects a substantial number of their employees, particularly people working in nonprofessional occupations.

The committee does not want to change the present tax status of non-profit organizations, but is concerned about the need of their employees for protection against wage loss resulting from unemployment.

Appendix

House bill.

Under the house-passed bill, unemployment insurance protection for employees of nonprofit organizations, and state hospitals and state institutions of higher education would be achieved by making state law coverage of services excluded solely by reason of paragraphs (7) and (8) of section 3306(c) of the internal revenue code of 1954 a condition for providing all other employers in the state with the existing credit against the federal unemployment tax. The states would be required also to provide nonprofit organizations with the option of reimbursing the state for unemployment compensation payments attributable to service with the organization in lieu of paying contributions under the normal tax provisions of the state law. In effect, the nonprofit organizations would be allowed to adopt a form of self-insurance. Under the reimbursement method of financing, a nonprofit organization whose workers experience no compensated unemployment in a year would have no unemployment insurance costs for that year. The committee considers it appropriate that these organizations, which are often dependent upon charitable contributions, should not be required to share in the costs of providing benefits to workers in profit-making enterprises.

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No. 04-1487

IN THE
Supreme Court of the United States

STATE OF NEW JERSEY, DEPARTMENT OF LABOR,
Petitioner

v.

THE RECONSTITUTED COMMITTEE OF UNSECURED CREDITORS OF THE UNITED HEALTHCARE SYSTEM, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATES OF PENNSYLVANIA, ARIZONA, CONNECTICUT, HAWAII, IDAHO, ILLINOIS, IOWA, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OREGON, TENNESEE, VIRGINIA, WISCONSIN, WYOMING AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICI

The Federal Unemployment Tax Act, 26 U.S.C. §3301 *et seq.*, establishes a cooperative state-federal program for the payment of unemployment compensation (UC) benefits;[1] and the *amici* States, like petitioner New Jersey, are responsible for administering that program within their respective States.[2] The Act

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[1] *See also* Subchapter III of the Social Security Act, 42 U.S.C. §§ 501 through 504.

[2] *See* Ala. Code §§ 25-4-30 to 25-4-152; Alaska Stat. §§ 5-535; Ariz. Rev. Stat. §§ 23-601 to 23-799; Ark. Code Ann. §§ 11-10-101 to 11-10-902; Cal. Unemp. Ins. Code §§ 1- 18012; Colo. Rev. Stat. § 8-70-101, et seq.; Conn. Gen. Stat. §§ 31-222 to 31-274j; Del. Code Ann. tit. 19 §§ 3301-3403; Florida Stat. Ch. 443.011-443.221; Ga. Code Ann. §§ 34-8-1 to 34-8-256; Haw. Rev. Stat. §383-61 to 383-79; Idaho Code §§ 72-1301 to 1385; Ill. Comp. Stat. §§ 405/100-405/3200; Ind. Code §§ 22-4-15-1 to 22-4-15-42; Iowa Code §§96 – 96.18; Kan. Stat. Ann. §§ 44.701-44.764; Ky. Rev. Stat. §§ 341.005-341.990; La. Rev. Stat. §§23-1471 to 1678; Me. Rev. Stat. 26, §§ 1041-1268; Maryland Code, Labor and Employment §§ 8-101-8-1608; Mass. Gen. Laws ch. 151A § 1-74; Mich. Comp. Laws §§ 421.1-421.75; Minn. Stat. §§ 268.001-268.26; Miss. Code Ann. §§71-5-1 to 71-5-541; Mo. Rev. Stat. §§ 288.010-288.500; Mont. Code Ann. §§ 39-51-101 to 39-51-3207; Neb. Rev. Stat. §§ 48-601 to 48-671; Nev. Rev. Stat. §§ 612.010 – 612.760; N.H. Rev. Stat. Ann. §§ 282-A:1-A1:80; N.M. Stat. Ann. §§ 51-1-1 to 51-1-59; N.Y. Lab. §§ 500-643; N.C. Gen. Stat. §§ 96-1 to 96-35; N.D. Cent. Code §§ 52-01-01 to 52-07.1-09; Ohio Rev. Code Ann. §§ 4141.01-4141.99; Okla. Stat. tit. 40 §§ 1-101 to 4-705; Oregon Rev. Stat. §§ 657-657.990; 43 P.S. §§751-914; R.I. Gen. Laws §§ 28-42-1 to 28-44-70; S.C. Code Ann. §§ 41-27-10 to 41-41-50; S.D. Codified Laws §§ 61-1 to 61-7-24; Tenn. Code Ann. §§ 50-7-101 to 50-7-714; Texas Labor Code Ann. §§ 201.001-215.004; Utah Code Ann. §§ 35A-4-101 to 35A-4-508; Vt. Stat. Ann. 21 §§ 1301-1461; Va. Code Ann. §§ 60.2-100 to 60.2-635; Wash. Rev. Code §§ 50.01.005-50.98.110; W.Va. (continued...)

provides that the UC program is to be funded by contributions assessed against most employers as a percentage of their quarterly payrolls, *see* 26 U.S.C. §§ 3301, 3302; but it also requires that non-profit employers like the respondent b e allowed instead to participate in the UC program by reimbursing the States for the benefits actually paid to their employees. *See* 26 U.S.C. § 3309(a).

Thus, the question faced by New Jersey in this case — whether these reimbursement obligations are "taxes" for purposes of the Bankruptcy Code's priority scheme — is one which is common to all of the States, and important to all of them. When a non-profit employer declares bankruptcy, large numbers of employees typically lose their jobs and receive UC benefits, giving rise to state claims for reimbursement. If these reimbursement claims do not receive priority in the employer's bankruptcy, the State is likely to receive little or nothing on the dollar; and the difference must be made up either by higher taxes on other employers, or by lower benefits for employees. The *amici* States have an interest in avoiding this unfair result, and in establishing uniform rules for the administration of the UC program.

SUMMARY OF ARGUMENT

1. This case presents an important question of federal bankruptcy law which affects all fifty States. Under the Federal Unemployment Tax Act (FUTA), the States are required to allow non-profit organizations to reimburse them for unemployment compensation benefits paid to their former employees. If these

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Code §§ 21A-1-1 to 21A-11-1; Wis. Stat. §§108.1-108.26; Wyo. Stat. Ann. §§ 27-3-101 to 27-3-705.

reimbursements constitute an excise tax under the reasoning of this Court in *State of New Jersey v. Anderson* and *City of New York v. Feiring*, then the States would be entitled to priority status under Sections 507(a)(1) and 507(a)(8) of the Bankruptcy Code. However, if as the Third Circuit held in this case, they do not, then the States will be relegated to the position of an unsecured creditor. As such, they will never recoup millions of dollars in unemployment compensation benefits paid from state funds. Such a result is contrary to Congress' intent in enacting both FUTA and the Bankruptcy Code.

2. The Circuits are divided on how to apply *Anderson* and *Feiring* to the priority provisions of the Bankruptcy Code. Because of the impact which the issue raised by this case has on the fiscal integrity of the States' unemployment compensation funds as well as other government programs, it needs to be resolved by the Court.

3. The reimbursement payments made by non-profits to the States are excise taxes under this Court's decisions in *Anderson* and *Feiring*. These payments are mandated by law and are used to support the States' unemployment compensation funds. The States have established these funds for the general welfare pursuant to their police powers. It is a fallacy to conclude, as did the Third Circuit, that these payments are "voluntary" or that they represent nothing more than a contract between non-profit organizations and the State for the right to conduct business.

ARGUMENT

I. Whether The States Have A Priority Claim For Payment Of The Unemployment Compensation Obligations Of Bankrupt Non-Profit Organizations Is An Important Issue Which The Court Should Resolve.

Non-profit employers play a significant role in the unemployment compensation (UC) program. All fifty States, as a condition of federal certification and funding under the Federal Unemployment Tax Act (FUTA), allow non-profits to participate in the UC program by reimbursing the States for UC benefits paid to the non-profits' employees. In 2003, non-profit organizations employed an average of 7.4 million people[3]; in the same year, the States paid former employees of non-profits almost a billion dollars in UC benefits.[4] Although not all of these benefits were paid as a result of bankruptcy, employees of non-profit organizations which are in financial difficulty and are forced to declare bankruptcy are of course more likely to lose their jobs than are those who work for more financially stable employers.

When a large non-profit employer — a hospital, say — declares bankruptcy, UC payments can easily approach or even exceed a million dollars. In Pennsylvania, the bankruptcy of Sacred Heart Hospital of Norristown resulted in UC payments — and a state reimbursement claim — of $3 million; and the bankruptcy of Allegheny Health Education and Research Foundation resulted in a reimbursement

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[3] Unemployment Insurance Financial Data Handbook 394 (U.S. Dep't of Labor, Employment and Training Administration (DOLETA)).

[4] The exact figure is $992 million. *Ibid.*

claim of more than $8.5 million. *See In re Sacred Heart Hosp. of Norristown*, 209 B.R. 650 (E.D. Pa. 1997); *In re Allegheny Health Education and Research Foundation*, Nos. 98-25773 – 98-25777 (Bk. W.D. Pa.). The experience of other States is similar. In the present case, New Jersey has a claim of $9.2 million. Massachusetts' reimbursement claim in *In re Boston Regional Medical Center, Inc. (Boston Regional I)*, 291 F.3d 111 (1st Cir. 2002), was $3 million. Michigan's claim in *In re Michigan Hospital and Medical Center*, No. 95-43297 (Bk. E.D. Mich.), was $1.1 million. Oregon's reimbursement claim in *In re Cottage Grove Hospital*, 265 B.R. 241 (Or. 2001), was more than $435 thousand and Ohio sought reimbursement for over $842 thousand in UC benefits it paid in *In re Parkview Hospital-Osteopathic Medical Center*, 211 B.R. 603 (Ohio 1997).

The Third Circuit's decision lumps these claims together with those of all other unsecured creditors, which means that, as a practical matter, States will collect little or nothing on them. Worse, it creates a perverse incentive for non-profits approaching bankruptcy to default on UC obligations which they might otherwise have paid, knowing that once in bankruptcy they can avoid, or at least substantially lessen, their obligations. Under the Third Circuit's regime, then, the States' reimbursement claims against bankrupt non-profits are likely to grow simultaneously both larger and less collectible.

The States' options for dealing with this financial impact are quite limited. Requiring non-profit organizations to make regular quarterly contributions like other employers would imply dropping out of the national UC program created by Congress, an alternative which is neither practical nor desirable. For fiscal year 2003, the value of FUTA tax credits to

employers nationwide was $46.4 billion.[5] For fiscal year 2004, the States received about $2.3 billion[6] from the federal government for administration of their UC programs and another $750 million for employment services.[7] The States cannot realistically maintain the present level of UC benefits without the support provided to them under FUTA.

Nor can the UC program simply absorb the added costs imposed upon it by these uncollectible claims against non-profits. The States' UC funds are intended to be self-sufficient, with incoming contributions and reimbursements at the level necessary to meet benefit expenditures. The funds are kept separate from general revenues and are deposited in the national Unemployment Trust Fund. 26 U.S.C. §3304(a)(4). The States' UC funds are already facing significant shortfalls. The States have been forced to borrow large amounts of money from the federal government in order to meet rising benefit costs and falling tax revenues. At the end of the 2003 fiscal year, the States owed a total of $1,581,134,000 to the federal government as a result of their UC obligations.[8] If the States are not reimbursed for benefits paid to former employees of non-profit organizations, the financial burden facing the States will become more severe. States will then be forced to recapture lost revenue by either charging other employers higher rates or by reducing benefits to the unemployed.

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[5] FUTA Receipts versus Amounts Returned for Fiscal Year 2003 (DOLETA).

[6] Fiscal Year 2004 State UI Allocations (DOLETA).

[7] Employment Service (Wagner-Peyser) PY 2005 Preliminary vs. PY 2004 Final Allotments (DOLETA), Federal Register, Vol. 70, No. 57 at 15515.

[8] Unemployment Insurance Financial Data Handbook No. 394 (DOLETA).

The question presented by this case is thus neither isolated nor unimportant, but rather is one which confronts all fifty States and a major federal program which affects literally millions of employees and employers. It is an important question of federal law which the Court should address and resolve.

II. The Third Circuit's Decision Has Deepened The Confusion Among The Lower Courts On How To Apply The *Anderson-Feiring* Test And Undermined The National Uniformity Congress Intended In Enacting Both The Federal Unemployment Tax Act And The Bankruptcy Code.

Almost a century ago, the Court in *State of New Jersey v. Anderson*, 203 U.S. 483, 492 (1906) held that a "tax" for the purposes of bankruptcy is a "pecuniary burden laid upon individuals or property for the purpose of supporting the government [which can be] enforced by action against the will of the taxpayer." In *City of New York v. Feiring*, 313 U.S. 283, 285 (1941), the Court reiterated this standard, stating that a tax "extends to those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of the government or of undertakings authorized by it...." More recently, in *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 221-22 (1996), the Court again endorsed these principles and specifically noted that Congress did not reject them when it enacted the Bankruptcy Code in 1978.

Nevertheless, as this case illustrates, the courts of appeals are deeply divided on whether reimbursement payments made to the States for unemployment compensation, workers compensation and other government programs should be considered a tax for

purposes of Sections 507(a)(1) and 507(a)(8) of the Bankruptcy Code. Although this Court's previous decisions in *Anderson*, *Feiring*, and *Reorganized CF & I Fabricators* provide some guidance on this question, the lower courts are confused and divided on how to apply their principles to cases like this one.

On one hand, the Ninth Circuit uses a four-part test which that court derived from *Anderson* and *Feiring*, *See In re Lorber Indus. of Ca. Inc.*, 675 F.2d 1062 (9th Cir. 1982). The *Lorber* test asks whether an exaction is (a) an involuntary pecuniary burden; (b) legislatively imposed; (c) under the police or taxing power of the state; and (d) for public purposes, including the purposes of defraying expenses of government or undertaking authorized by the government. *See id.*, at 1066. If so, then the exaction is a tax.

The Second, Fourth, Eighth and Tenth Circuits have followed the Ninth Circuit, and in applying these factors have held that governmental exactions similar to the UC contributions at issue in this case are "taxes" within the meaning of the Bankruptcy Code. *See In re Chateaugay Corp. v. Shalala*, 53 F.3d 478, 498 (2nd Cir. 1995) (payments under the Coal Industry Retiree Health Benefit Act of 1992 are taxes); *Williams v. Motley*, 925 F.2d 741, 743-44 (4th Cir. 1991) (assessment for uninsured motor vehicle was a tax); *New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund*, 886 F.2d 714, 720 (4th Cir. 1989) (premiums owed to workers compensation fund were a tax); *In re Juvenile Shoe Cop. of America*, 99 F.3d 898, 901 (8th Cir. 1996) (assessment on money withdrawn from employee pension plan under 26 U.S.C. §4980 was a tax); *In re Camilli*, 94 F.3d 1330, 1333 (9th Cir. 1996) (reimbursement of workers' compensation benefits to the State was a tax), *cert. denied*, 519 U.S. 1113 (1997); *In re Sunnyside Coal Co.*, 146 F.3d 1273 (10th Cir. 1998) (payments under Coal Industry Retiree Health Benefit Act were a tax). *Cf. In re Lorber Indus. of*

Ca. Inc., supra (sewer fee not a tax under *Anderson-Feiring* because it was voluntarily assumed and in the nature of a contract).

On the other hand, the Third Circuit in this case, as well as the First Circuit, the Sixth Circuit and other lower courts have held that similar claims are not taxes, but are instead ordinary debts owed to the State. *See In re Boston Regional Medical Center, Inc.*, 291 F.3d 111 (1st Cir. 2001) ("*Boston Regional I*") (unemployment compensation reimbursement); *In re Suburban Motor Freight, Inc.*, 36 F.3d 484 (6th Cir. 1994) ("*Suburban II*") (reimbursement of payments made under state workers compensation law were not "excise tax" for purposes of Bankruptcy Code); *In re Freymiller Trucking, Inc.*, 194 B.R. 914 (Bk. W.D. Okla. 1996) (reimbursements not a tax); *In re Payne*, 27 B.R. 809 (Bk. D. Kan. 1983) (same).

Even these courts have been divided in their reasoning, unable to agree on a single test which can be easily applied in this area. For example, the Sixth Circuit in *Suburban Motor Freight, Inc.*, 36 F.3d 484 (6th Cir. 1993) ("*Suburban II*") (in the context of workers compensation), added to the *Anderson-Feiring* test the requirements that the exaction must be "universally applicable to similarly situated entities" and that "according priority treatment to the government claim [will] not disadvantage private creditors with like claims." *Suburban II*, 36 F.3d at 488. The First Circuit, in *Boston Regional I*, thought that the fact that Massachusetts could have required the debtor to post a bond was dispositive. In this case, the Third Circuit disagreed with the reasoning of the First Circuit, but nonetheless concluded that the reimbursement payments were not a tax. However, as Chief Judge Scirica's dissent demonstrates, the test used by the Third Circuit is confusing and difficult, if not impossible, to apply, and would lead to inconsistent and mixed results if other courts attempted to rely on

it. *United Healthcare*, 396 F.3d at 247 (Scirica, C.J., dissenting).

The division and confusion among the circuits which the Third Circuit's decision exemplifies defeats Congress' intent to create not only a uniform law for bankruptcy, *see Feiring*, 313 U.S. at 285, but also a uniform system for unemployment compensation. *See St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 775 (1981). The Court should step in to resolve this confusion by providing the lower courts with much-needed guidance.

III. Reimbursement Payments By Non-Profit Employers Of Unemployment Compensation Benefits Are Excise Taxes Within The Meaning Of The Bankruptcy Code.

The Third Circuit's decision in the present case cannot be reconciled with this Court's view of what constitutes a tax for the purposes of bankruptcy. In *Anderson* and *Feiring*, this Court held that for the purposes of bankruptcy a tax is a "pecuniary burden" imposed on an individual or entity without their consent in order to support the government or programs authorized by the government. *Anderson*, 203 U.S. at 492; *Feiring*, 313 U.S. at 285. The Court reaffirmed the principles underlying those decisions in *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 222 (1996) (referring to "continuing vitality of the cases in the *Feiring* line"). Under a straightforward application of the *Anderson-Feiring* standard, the UC reimbursements owed to New Jersey are a tax, entitled to priority under Sections 507(a)(1) and (8) of the Bankruptcy Code, 11 U.S.C. §507(a)(1) and (8). The reimbursements are involuntary payments required by the legislature in order to support New Jersey's UC system. The conclusion of the Third Circuit majority that these payments are "voluntary" and are

part of an implied contract with the State is simply untenable.

In deciding this case, the Third Circuit failed to adhere to this Court's standard — or, indeed, to any discernible standard — in an effort not to fail to "consider the characteristics of the obligation in light of the evolving treatment of priority claims under the Bankruptcy Code." *United Healthcare*, 396 F.3d at 256. In fact, the Third Circuit goes farther than the Sixth or the First Circuit by adopting a "functional examination that balances the characteristics of the obligation" and which is "flexible enough to allow for consideration of any relevant factor." *Id.* 396 F.3d at 255. Although the Third Circuit recognized that Congress had not rejected the *Anderson-Feiring* line of cases in enacting the 1978 Bankruptcy Code, it provided no explanation for adopting a completely open-ended approach which sets no limits and provides little guidance on how it should be applied by the lower courts.

Finally, the Third Circuit's decision encourages non-profits to default on their obligations, and unfairly requires for-profit employers and employees to subsidize non-profits through lower benefits and increased contributions. This cannot be what Congress intended in enacting either FUTA or the Bankruptcy Code.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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No. 04-1487

In the

Supreme Court of the United States

State of New Jersey, Department of Labor,
Petitioner,

v.

The Reconstituted Committee of Unsecured Creditors of the United Healthcare System, Inc.,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals For the Third Circuit

REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

As of 1970, the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §3301, *et seq.*, allowed the States to impose an obligation on non-profit employers to pay state-level Unemployment Compensation ("UC") taxes. *California v. Grace Brethren Church*, 457 U.S. 393, 397, n.6 (1982) (citing *Pub. L.* 91-373, §104(b)(1)). However, FUTA also mandates that, in imposing this involuntary exaction, the States must allow non-profit employers the option of paying the UC taxes in advance, or reimburse the State for unemployment benefits that the State pays to former employees of the organization. 26 U.S.C. §§ 3306(c)(8), 3309(a).

As demonstrated by the Petitioner ("the State") in the certiorari petition, the decision of the Third Circuit has recast the FUTA mandated alternative method of collection of tax

obligations, into a contract between the State and electing non-profit employers. Clearly, its analysis and holding did not result from a straight forward application of this Court's test as to "what is a tax" but rather, evinces a view that courts must invent more searching tests to satisfy the goals of the bankruptcy system.

I. THE INVOLUNTARY EXACTIONS IMPOSED UPON NON-PROFIT EMPLOYERS, COLLECTIBLE AS REIMBURSEMENTS, MEET THIS COURT'S TESTS FOR WHAT IS A TAX

This Court has expressly and explicitly set forth a broad standard for determining whether an exaction is a tax. *See, State of New Jersey v. Anderson*, 203 U.S. 483 (1906) and *City of New York v. Feiring*, 313 U.S. 283 (1941). The standard was reaffirmed in *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (stating that "[a] tax is an enforced contribution to provide for the support of government," contrasting it with a penalty which is "imposed by statute as punishment for an unlawful act").

A straight-forward application of this test leaves no room for doubt that a non-profit employer's involuntary obligation to pay its share of unemployment taxes, collected by the State in the form of reimbursements, is a tax. The employer's obligation to reimburse is mandatory, imposed upon it by statute, and is a method of satisfying its duty to fund the unemployment compensation benefits for its laid-off employees. The State statute explicitly declares that unemployment compensation benefits are provided for the public good. N.J.S.A. 43:21-2. Courts have also universally agreed that the unemployment compensation system is an appropriate governmental purpose, undertaken for the common welfare of its citizens. As such, the exactions here, are plainly a tax.

Respondent maintains that the Third Circuit in this case, faithfully applied this Court's standard in *CF&I*, *supra*,

conducted a "functional analysis" and concluded that the obligations did not qualify as a tax because the obligations did not raise funds to "support a general governmental undertaking." Opp. Brf. at pp. 13-18. However, the Third Circuit did not execute a simple and straight forward application of this Court's tests. Rather, it engaged in a far more searching analysis and review to determine whether this payment was a tax, or some sort of contractual debt. This was evidently because, as the Third Circuit noted, the scope of priority for "government obligations" had changed considerably from the Bankruptcy Act to its replacement by the Bankruptcy Code. *See*, Pet. App. 9, 14.[1]

In addition the Third Circuit had to resort to relying upon cases such as *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974), to bolster its conclusion that the involuntary reimbursement obligation of the employer to make payments to the UC Fund resulted from a contractual relation between the State and the employer, and was thus an ordinary debt, akin to a fee. *See*, Pet. App. 23.

In this connection, Respondent erroneously asserts that the State "concedes ... that the Reimbursement Obligation did not contribute to the administrative costs or the solvency of" the State's "unemployment compensation system." Opp. Brf. at p.17, n.8; p.21 (referencing the State's Petition at p.4). The State made no such concession.

Rather, in explicating that the reimbursement amount sought from the electing non-profit employer comprises the actual unemployment compensation benefits paid to the laid off employees, and does not include costs or assessments, the State asserted that the reimbursements represent amounts *exclusive* of other costs and assessments. Such costs and assessments are *independently* imposed on these employers under N.J.S.A.

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[1] "Pet. App." refers to the State's Appendix filed with its Petition for Writ of Certiorari.

43:21-7(e) and N.J.S.A. 43:21-48. In fact, the State expressly asserted that its statute imposes costs and assessments on all employers including non-profits. *See*, Petition at p.25 (relying on N.J.S.A. 43:21-48, Pet. App. 95-96).[2]

II. COURTS ARE SPLIT IN DECIDING THE FUNDAMENTAL AND PRIMARY ISSUE, NAMELY, "WHAT IS A TAX"

Every case involving the analysis of 11 U.S.C. § 507(a)(8) requires preliminary determination of a fundamental issue, namely, whether an exaction by a governmental unit is a tax. Nowhere in its opposition does the Respondent disagree with this precept.[3]

However, "lower courts have . . . struggled in applying the *Feiring-Anderson* analysis" in bankruptcy cases. *Boston Reg'l Med. Ctr., Inc. v. Massachusetts Div. of Health Care Finance and Policy*, 365 F.3d 51, 58 (1st Cir. 2004) (*"Boston Reg'l II"*). Thus, they have weighed the "tax characteristics of a state-imposed exaction" with its "non-tax characteristics;" analyzed the "tax attributes" of the exaction; or focused upon the "the Bankruptcy Code's principle of equal distribution of the debtor's estate." *Ibid.* This has resulted in conflicting decisions due to the application of widely divergent standards.

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[2] This is also why the State's proofs of claim filed in the debtor's bankruptcy included, *in addition to the reimbursement amounts*, amounts for unpaid employer/employee State disability contributions and annual assessments imposed on the employer. Petition at 5, n.3.

[3] Respondent's emphasis of the Bankruptcy Court's denial of an administrative status to the State's claim, and alternative priority status under 11 *U.S.C.* §507(a)(8)(D), Opp. Brf. at pp. 3-5, is irrelevant to the issues presented here since they were not the subject of appeal at any appellate stage. Respondent fails to mentions that the State's administrative claim was reclassified as a priority claim for approximately $9 million. Thus, Respondent's futile attempt to deflect attention from its losses in the lower courts, is unavailing.

Respondent claims there is no conflict because both the First Circuit in *In re Boston Reg'l Med. Ctr., Inc.*, 291 F.3d 111, 121-122 (1st Cir. 2002) ("*Boston Reg'l I*") and Third Circuit in this case undertook a functional analysis of the exaction and concluded that the reimbursement obligations of non-profit employers to the State was not a tax. Opp. Brf. at pp. 9-10. However, Respondent fails to acknowledge that the Third Circuit expressly disagreed with the First Circuit's "functional analysis" and specifically rejected the First Circuit's conclusion that the availability of a surety bond in favor of the State weighed against granting the reimbursement obligation a tax status. Pet. App. 19-20.

Similarly, while the First Circuit found it extremely persuasive that the non-profit employers were not imposed costs and assessments in relation to the Commonwealth's UC fund, *Boston Reg'l, I, supra,* 291 F.3d at 121-22, the Third Circuit did not even consider the role of costs and assessments imposed by New Jersey on electing non-profit employers.[4]

Respondent's conclusion that there is no conflict because the "holding" of these two Circuits are the same (reimbursements owed to the State under the UC laws are not taxes), regardless of the reasoning or analysis, Opp. Brf. at 7-8, n.5, is superficially simplistic and patently erroneous. When the test of what constitutes a tax is being applied unevenly and inconsistently by the Circuits and the lower courts, such that even decisions that reach the same result, "unfortunately lack[] consistency," *In re Suburban Motor Freight, Inc.*, 998 F.2d 338, 340 (6th Cir. 1993) ("*Suburban I*"), there is no question that disparate application of this Court's standards has resulted in inconsistent rulings as to the basic issue and premise of a court's holding, namely, "what is a tax," thereby causing an unresolved conflict.

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[4] Indeed, it could not have given that the New Jersey statutes impose costs and assessments on all employers including non-profits, N.J.S.A. 43:21-48 (Pet. App. 95-96).

Respondent ignores the fact that circuit courts agree that the issue of whether a reimbursement is a tax has been decided with varying and conflicting results, with some courts applying the *Anderson-Feiring* test (as explicated in *County Sanitation v. Lorber Indus. of California, Inc.*, 675 F.2d 1062, 1066 (9th Cir. 1982) *"Lorber"*), and some courts preferring to give "particular and separate weight to the Bankruptcy Code's principle of equal distribution of the debtor's estate." *See, Boston Reg'l II*, 365 F.3d at 58; *New Neighborhoods, Inc. v. West Va. Workers Comp. Ins. Fund*, 886 F.2d 714, 717-19 (4th Cir. 1989) (courts approach the issue of whether an exaction is an excise tax in three ways, one set of courts apply the "broad coverage definition" of a tax; the second approach examines the state statute and weighs the tax versus non-tax attributes of the statutory scheme; and the third approach is to deem an exaction a tax, if the exaction had sufficient tax attributes regardless of other attributes).

In fact, Respondent concedes the existence of the widely differing standards when it endorses these bankruptcy-motivated modifications, and actually adds another limitation to this Court's test of "what is a tax" by maintaining that this issue should be controlled by the "important Federal policy" of the Bankruptcy Code, namely, that "priorities in bankruptcy ... be narrowly construed." Opp. Brf. at p.20. It is precisely these carved out exceptions that obliterate the priority scheme of the Bankruptcy Code, and undermine this Court's test.

Respondent's dismissal of the State's reliance on cases involving state Workers Compensation (WC) programs; "charity care" laws (*Boston Reg'l II*) and "sewer use statutes" (*Lorber*) as establishing a conflict fares no better.[5] All the

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[5] Notably, the Respondent relied upon these cases in support of its contentions that the reimbursements are not a tax. *See*, App. 1-12. *See, also*, Opp. Brf. at p.19-20. Evidently, the Respondent's assertion, now, that these cases are under "separate statutes" and therefore, irrelevant, is a futile effort to establish lack of conflict and prevent this Court from granting certiorari.

cases involving WC liabilities exacted as reimbursements have been utilized by the courts in determining the primary issue, namely, whether an exaction is a tax (and an excise tax) in the realm of unemployment taxes (payable as contributions/reimbursements). The analogy in both instances is the same because courts necessarily examine whether the exaction is a tax in either context. *See, e.g., Boston Reg'l, I*, 291 F.3d at 121-122 (setting out the "various cases that have determined to assign priority to unemployment insurance contributions and to similar obligations" and agreeing that "[w]ithin the framework established by precedent" the reimbursements due under the State's UC laws could arguable be "called taxes."); *In re Cottage Grove Hosp.*, 265 B.R. 241, 246 (Bankr. D. Or. 2001) ("the requirement imposed upon employers, under Oregon law, to make percentage payments or reimbursement payments to the [UC] Fund is analogous to the requirements imposed upon employers to make payments" under the State's worker's compensation laws); *In re Pan American Paper Mills*, 618 F.2d 159 (1st Cir. 1980) (worker's compensation premiums, like unemployment insurance premiums, should be treated as taxes because they were both pecuniary obligations imposed by the government for defraying the expenses of an authorized undertaking); *Sacred Heart Hospital of Norristown v. Pennsylvania Dept. of Labor & Indus.*, 209 B.R. 650 (E.D. Pa. 1997).

Even in the "charity care statute" at issue in *Boston Reg'l II, supra*, the First Circuit analyzed these very WC cases, and the "sewer use" case (*Lorber*), to conclude that the exactions were a tax, *Boston Reg'l II*, 365 F.3d at 65. In doing so, the court explicitly pointed out to the conflicting opinions due to the "struggle[] in applying the *Feiring-Anderson* analysis to debts in a bankruptcy setting." *Boston Reg'l II*, 365 F.3d at 58.

III. THE QUESTION PRESENTED IN THE CERTIORARI PETITION WARRANTS REVIEW

This case presents a first-impression, significant federal question for this Court. This is, whether the Third Circuit's

decision destroys the taxing power of the States, which have been congressionally granted the right to tax non-profit employers for unemployment taxes to fund the State's UC fund, but are required to collect that tax either as a contribution or as a reimbursement in lieu. This issue significantly affects and impacts all fifty states.[6]

Respondent claims this case presents nothing new or significant because this Court has already stated the tests for determining "what is a tax." Opp. Brf. at p.19-20.[7] But it is precisely because the courts are split on applying this Court's test, and have engrafted the test with their own limitations, such that the exceptions are threatening to swallow the rule, that this case presents a significant unresolved federal question.

Respondent misses the point by arguing that the Third Circuit's decision accords with the scheme of FUTA. Opp. Brf. at p.20. The issue is not that FUTA requires the States to allow non-profit employers an alternative method of paying their UC obligations. The issue is whether the obligations imposed by the State under the UC laws, collected as reimbursements, are a tax. The Third Circuit has stated that the FUTA is silent on this, Pet. App. 23, as did the Bankruptcy Court. Pet. App. 51.

Respondent's attempts to minimize the significance of the issue presented here by contending that it is a one-of-a-kind case, with almost no precedential value, Opp. Brf. at p.21, is off the mark. The Respondent has done nothing to conclusively prove its speculated assertions, namely, that there are few to none non-profit employers, that these employers rarely if ever

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[6] Twenty-three States have joined on a brief in support of the State's petition for writ of certiorari, as *amici curiae*.

[7] The Third Circuit conceded that this is a "close" and "difficult" case. Pet. App. 19 (majority); Pet. App. 24 (Chief Judge Scirica, dissenting). Respondent's attempt to minimize the importance of this case, and the need for a resolution by this Court, thus, strikes as extremely hollow.

file for bankruptcy, and then, rarely if ever, terminate employees.[8] The bankruptcy filings and issues in this matter, in the matter of *Sacred Heart, supra*, *Boston Reg'l, I, supra*, *In Cottage Grove Hosp., supra*, *In re Memorial Medical Center*, Dkt. No. 00-61255 (Bankr. D.N.J. 2001),[9] all belie the nonchalant dismissal by the Committee of the seriousness of the issue, and the impact of the same on all States which are mandated by the FUTA to allow non-profit employers the option of either making quarterly contributions to the UC fund, or to reimburse the Fund for the unemployment benefits paid.

In this connection, Respondent's optimistic assertion that the State will get some recovery as a general unsecured creditor,[10] and therefore this case does not merit review by this Court, Opp. Brf. at p.22, is not only irrelevant, but also does not undermine the State's position that the Third Circuit's precedential decision has severely affected the very integrity and solvency of the State's UC fund, a fund held in trust solely for the payment of UC benefits.

In sum, there is a conceded lack of uniformity in deciding the precise foundational and fundamental issue of "what is a tax." This Court is being asked to resolve this issue as it impacts all 50 States and because it is required to best serve the unemployed public.

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[8] *Cf.*, Amici Brf. at p.4 (in 2003 non-profit employers had "7.4 million" employees, and "States paid former employees ... almost a billion dollars in UC benefits...").

[9] *See, also, Amici* Brf. at pp. 4-5.

[10] Respondent does not factor in any administrative expenses (such as its counsel's fees) which, as a first-tier priority expense, will further deplete the available funds.

IV. THE THIRD CIRCUIT'S DECISION IS WRONG

Certiorari is also warranted because the decision below is wrong. The Third Circuit did not consider the UC statutpry scheme as a whole, but improperly made a selective use of statutes in arriving at its conclusion.

Thus, the court improperly overlooked N.J.S.A. 43:21-9(a) (defining the UC fund as comprising of contributions and reimbursements); N.J.S.A. 43:21-9(b); (c) (mandating that monies withdrawn from the UC trust fund be used only to pay unemployment benefits); N.J.S.A. 43:21-7.2 (d); 43:21-7(a)(1) (non-profit employers cannot deduct their obligations from the employee's salary); N.J.S.A. 43:21-3; 4; 5 (no distinction in the method of computing unemployment benefits payable to the unemployed individual); N.J.S.A. 43:21-48 (costs and assessments of maintaining the UC Fund imposed on all employers).

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX

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App. 1

No. 03-4768
In The
United States Court of Appeals
for the
Third Circuit

RECONSTITUTED COMMITTEE OF UNSECURED CREDITORS OF UNITED HEALTHCARE SYSTEM, INC.,

Appellant,

-against -

STATE OF NEW JERSEY,
DEPARTMENT OF LABOR,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF OF APPELLANT, RECONSTITUTED COMMITTEE OF UNSECURED CREDITORS OF UNITED HEALTHCARE SYSTEM, INC.

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POINT II

THE BANKRUPTCY COURT ERRED IN FINDING THAT THE REIMBURSEMENT OBLIGATIONS WERE A TAX UNDER ANDERSON, FEIRING, LORBER AND SUBURBAN II BECAUSE OF THE NUMEROUS NON-TAX CHARACTERISTICS OF THE REIMBURSEMENT OBLIGATIONS

Like other courts addressing the priority status of reimbursement obligations and other governmental claims, the Bankruptcy Court and the District Court employed an analysis developed under the now-repealed Bankruptcy Act of 1898 (as amended) and laid out in four cases: *State of New Jersey v. Anderson*, 203 U.S. 483 (1906), *City of New York v. Feiring*, 313 U.S. 283 (1941), *In re Lorber Industries of California (County Sanitation Dist No. 2 of Los Angeles County v. Lorber Industries of California, Inc.* , 675 F.2d 1062 (9th Cir. 1982), and *In re Suburban Motor Freight Inc., (Ohio Board of Workers' Compensation v. Yoder)* 36 F.3d 484 (6th Cir. 1994) ("*Suburban II*"). But the Bankruptcy Code of 1978, which is applicable here, expressly narrowed the applicability of those cases by limiting the type of tax claims granted priority status.

. . .

A. The Limited Efficacy of the Anderson-Feiring Test Under the Bankruptcy Code.

Anderson and *Feiring* were based on Section 64(a) of the Bankruptcy Act), *Anderson*, 203 U.S. at 487; *Feiring*, 313 U.S. at 285, which granted priority status to any "tax" the debtor owed to the government:

> The debts to have priority in advance of the payments of dividends to creditors, and to be paid in full out of bankruptcy

> estates, and the order of payment shall be ... (4) taxes which became legally due and owing by the bankruptcy to the United States or to any state or any subdivision thereof ...

Bankruptcy Act, § 64(a) *reprinted* in L. King., ed., Collier on Bankruptcy. Appendix, Volume A, Part 3(a) at App. Pt. 3 63-63. (15th ed. rev. 1996).

Because any governmental claim was entitled to priority under the Bankruptcy Act, the *Anderson-Feiring* line of cases is helpful only in determining whether a claim was a governmental claim or whether the claim belonged to a non-governmental entity. Thus, the status of the holder of the claim (governmental entity or not) determined whether a claim was generally a tax priority claim under the Bankruptcy Act. This analysis in no way assists in determining whether DOL's Reimbursement Claims are entitled to a tax priority claim under the current Bankruptcy Code.

Even before enacting the Bankruptcy Code, Congress recognized that granting priority to all governmental claims threatened the -integrity of the bankruptcy system:

> As accelerating taxation absorbed greater percentages of the bankrupt's estate, Congress recognized that broad priority classifications hampered the goal of equitable distribution of the estate and penalized general creditors. As a result, the trend of amendments to section 64(a) has been to erode the preferred status of taxes.

Lorber, 675 F.2d at 1067-68.

Lorber also emphasized that the Bankruptcy Code has gone further than the amended Bankruptcy Act in restricting the priority granted to tax claims:

> The revised Bankruptcy Act of 1978 is consistent with this trend. Section 507 ... grants priority status to certain enumerated tax claims. The structure of this statute suggests *a clear intent to limit taxes entitled to priority.*

Id. at 1068 n.5 (emphasis added). *See also* 11 U.S.C. § 507.

Thus, as discussed in more detail below ,*see infra* Point III, even if DOL's Reimbursement Claims are found generally to be a "tax" under the *Anderson-Feiring* test, the Court must still find that the claim is an "excise tax on a pre-petition transaction" before the Reimbursement Claims can be granted priority under Bankruptcy Code § 507(a)(8)(E).[11]

---

[11] While the Bankruptcy Code § 507(a)(8)(E) contains this key distinction from Section 64(a) of the Bankruptcy Act, due to their focus on the Anderson-Feiring test many courts have nonetheless failed to observed Congress' intent to limit taxes entitled to priority under the Bankruptcy Code leaving the old caselaw intact and addressing solely whether the claim asserted was a governmental claim in fact, and therefore, a "tax" entitled to priority. *See eg.*, *Sacred Heart Hospital of Norristown v., Commonwealth of Pennsylvania, Department of Labor and Industry* (*In re Sacred Heart Hospital of Norristown*, 209 B.R. 650 (E.D. Pa. 1997)(granting excise tax priority without identifying relevant transaction); *In re Cottage Grove Hospital*, 265 B.R. 241 (Bankr. D. Or. 2001) (same); *In re Beaman*, 9 B.R. 539 (Bankr. D. Or. 1980) (same). Because these cases fail to identify an underlying prepetition transaction on which the tax is levied as required by the current Bankruptcy Code, they must be ignored in considering whether DOL's Reimbursement Claims should be granted priority under Bankruptcy Code §507(a)(8)(E).

Notwithstanding the questionable utility of the *Anderson-Feiring* line of cases, courts, including the Bankruptcy Court and the District Court here, continue to employ their approach to determine whether a governmental claim is a "tax." As summarized in *Lorber*, the *Anderson-Feiring* approach construes the claim to be a tax when it is: "(a) an involuntary pecuniary burden, regardless of name, laid upon individuals or property; (b) imposed by or under authority of legislature; (c) for public purposes, including the purposes of defraying expenses of government or undertakings authorized by it; (d) under the police or taxing power of the state." *Lorber*, 675 F.2d at 1066.

Recognizing the extreme breadth of this definition, however, and mindful of the trend to limit priorities, *Lorber* and *Suburban II* rejected the *Anderson-Feiring* test and required additional indicia of tax status before characterizing a governmental claim as a tax claim because "all money collected by the Government goes toward defraying its expenses, and is used for public purposes." *Suburban II*, 36 F.3d at 488. As articulated in *Suburban II*, the two additional elements for the government's claim to be considered as a tax are:

> (1) that the pecuniary obligation be universally applicable to similarly situated entities; and (2) that according priority treatment to the government claim [does] not disadvantage private creditors with like claims.

Suburban II, 36 F.3d at 488.

Employing these additional restrictive criteria, the *Suburban II* court determined that the non-tax characteristics of a workers' compensation statute predominated over the statute's tax characteristics and, thus, was held not to be a tax under the Bankruptcy Code. *Id.* at 489. The United States

Supreme Court also recently has acknowledged that a court must engage in a functional analysis and determine whether a government claim is a "tax" based upon "the operation of the provision using the term in question." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 220 (1996). Thus, the question of whether the DOL Reimbursement Claims are a "tax" hinges upon the operation of N.J.S.A. 43:21-7.2.

. . . .

C. The Reimbursement Obligations Are Not a Tax But a Form of Self-Insurance.

. . .

Several courts recognize that when a government exaction arises from the employer's default in providing self-insurance, the governmental entity's claims more closely resembles a claim for subrogation than a levy for general governmental purposes. *See, e.g. Ohio Bureau of Workers'-Compensation v. Yoder* (*In re Suburban Motor Freight, Inc.*), 36 F.3d 484, 489 (6th Cir. 1994) ("In sum, the non-tax characteristics of Suburban's liability for reimbursement for claims payments predominate over its tax characteristics and the Bureau's claim more closely resembles a subrogation claim than a universally applicable tax."); *In re Park*, 212 13.R. 4302 436 (Bankr. D. Mass. 1997) ("In denying priority status to reimbursement claims, courts have noted the similarity between these claims and subrogation claims."); *In re Payne*, 27 B.R. 809, 817 (Bankr. D. Kan. 1983) (reimbursement obligations "have more substantial non-tax characteristics and are more likened to an assignment of or subrogation to a Tort Claim than a tax").

. . .

E. The Reimbursement Claims Are Not A Tax Because They Only Benefit A Particular Class Of Creditors.

. . .

Other courts likewise have found that worker's compensation reimbursement obligations were not "tax" obligations because the obligations were not applied to the general welfare:

> True, this reimbursement debt is a pecuniary burden imposed by Massachusetts to defray a cost of government. ... The reimbursement burden is not, however, universally applied to all similarly situated constituents. All Massachusetts employers pay WCTF assessments, but only some pay reimbursement claims.... Moreover, reimbursements to the WCTF [state workers' compensation fund] are not revenues applied to the general welfare....

Park, 212 B.R. at 436. *Accord In re Metro Transport Company*, 117 B.R. 143, 154 (Bankr. E.D. Pa. 1990) ("The benefits from the [workers' compensation] Fund are also earmarked for a very specific group: those injured in the workplace whose employers are contributors, to the Fund. Thus, the Fund's charges have very little similarity to a tax.").

. . .

F. The Reimbursement Obligations Are Not A Tax Because They Are Not A Fixed And Predictable Percentage Of Wages Paid.

Another non-tax characteristic of the reimbursement obligations is that it is not assessed at a fixed, predictable rate:

> It is also within common understanding and sense that a "tax" is assessed at a fixed rate. I am unable to think of a "tax," in the ordinary sense of the noun, that is not based on a percentage of something, be it income, sales, corporate capital, or the value of property, a gift or inheritance. Since taxes are always fixed at some rate taxpayers are able to predictably plan their financial affairs by determining in advance what their tax liabilities will be as a result of a particular transaction or event.

In re Freymiller Trucking, Inc., 194 B.R. 914, 915 (Bankr. W.D. Okla. 1996).

. . .

Accordingly, given all the non-tax attributes of the reimbursement obligations set forth above, the Bankruptcy Court and the District Court erred in determining that the Reimbursement Claims were a "tax" even under the *Anderson-Feiring* and *Suburban II* tests.

POINT III

EVEN IF THE REIMBURSEMENT CLAIMS QUALIFY GENERALLY AS A "TAX" THEY DO NOT QUALIFY AS AN EXCISE TAX ON A PREPETITION TRANSACTION ENTITLED TO PRIORITY UNDER THE BANKRUPTCY CODE

. . .

A. The Plain Language of the Bankruptcy Code Must Control.

. . .

Courts have recognized that this statutory provision grants priority only to tax obligations that can, be immediately linked to a discrete transaction undertaken by the debtor within the three years immediately preceding the debtor's petition date. *See In re DeRoche*, 287 F.3d 751-755 (9th Cir. 2002) (multifaceted genesis of workers' compensation claim undermined priority treatment); *In re Templar*, 170 B.R. 562, 564 (Bankr. M.D. Pa. 1994) (holding that status-based or occupation-based excise taxes are not entitled to priority under the Bankruptcy Code).

B. The Bankruptcy Code's Priorities Must Be Narrowly Construed.

The need to identify a discrete prepetition transaction by United is even more critical given that priorities under the Bankruptcy Code are narrowly construed to protect general unsecured creditors:

> In deciding the issues presented in this case, we remain mindful of the admonition that

> "[e]quality of distribution among creditors is a central policy of the Bankruptcy Code." *Begier v. Internal Revenue Serv.*, 496 U.S. 531, 58), 110 S.Ct. 2258, 2263, 110 L.Ed.2d 46 (1990). Thus, *priority claims must be carefully limited since every such claim reduces the fund available to general creditors*. For this reason, "creditors must directly tie their priority claims to specific provisions of the Bankruptcy Code." *Suburban 1*, 998 F.2d at 342.

Suburban 11, 36 F.3d at 487 (emphasis added). *Accord In re Metro Transp. Co.*, 117 B.R. 1437 154 (Bankr. E.D. Pa. 1990) ("there is a presumption in bankruptcy cases ... that the debtor's limited resources will be equally distributed among his creditors [causing] statutory priorities [to be] narrowly construed.").[12]

C. Excise Taxes Traditionally Are Imposed on the Manufacture, Sale or Use of Goods.

Because the Bankruptcy Code does not define "excise tax," courts have turned to other sources, each of which confirms that excise taxes have almost uniformly been levied on discrete, one-time transactions. In *In re Marcucci*, 256 B.R.

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[12] The priority treatment is material here. If DOL's Reimbursement Claims are priority claims, United's unsecured creditors will recover less than twenty-four percent (24%) of their unsecured claims. But, if the DOL's Reimbursement Claims are treated as unsecured, non-priority claims, as argued by the Reconstituted Committee, unsecured creditors (including the DOL) will recover approximately thirty-six percent (36%) of their unsecured claims.

685, 696,(D.N.J. 2000), the District Court for the District of New Jersey adopted the Black's Law Dictionary definition of excise tax, commenting that "[t]raditionally, excise taxes have been recognized as taxes imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)." *Marcucci*, 256 B.R. at 296 (citing Black's Law Dictionary) . *Cf. Templar*, 170 B.R. at 564 (recognizing the long line of cases that have adopted the Black's Law Dictionary definition and citing *In re Groetken*, 843 F.2d 1007, 1013 (7th Cir. 1988); *In re Rosenow*, 715 F.2d 277, 279 (7th Cir. 1983); *In re Chateaugay Corp.*, 153 B.R. 6,32, 638 (Bankr. S.D.N.Y. 1993); *In re Tri-Manufacturing and Sales Co.*, 82 B.R. 58, 60 (Bankr. S.D. Ohio 1988); *In re Tapp*, 16 B.R. 315, 322 (Bankr. D. Alaska 198 1)).

. . . .

Other courts have reached similar conclusions. For example, in *In re Park*, 212 B.R. 4A 434 (Bankr. D. Mass. 1997), which *Marcucci* found persuasive, the court noted that "[e]xcise taxes have traditionallybeen imposed on alcohol, tobacco, fuel, and luxuries and include sales taxes, estate and gift taxes, wagering and truck taxes." *Marcucci*, 256 B.R. at 696. *Accord In re DeRoche*, 287 F.3d 751, 755 (9th Cir. 2002) ("A fundamental characteristic of a typical excise tax is that it is a discrete,, one-time tax based on a single act by the person or entity taxed, such as a sale or an application for a license.").

. . .

F. The Workers Compensation Analogy Also Demonstrates the Need for a Discrete Pre-Petition Transaction.

The workers' compensation cases DOL cited to the District Court, *In re Olga Coal Co.*, 194 B.R. 741 (Bankr. S.D.N.Y. 1996); *In re Hynes*, 229 B.R. 405 (Bankr. W.D. Mich. 1998);

In re Voightman, 239 B.R. 380 (8th Cir. B.A.P. 1999); *In re Camilli*, 94 F.3d 1330 (9th Cir. 1996); *In re Hutchinson*, 135 B.R. 890 (Bankr. D. Ariz. 1992), also fail to provide a basis for granting United's Reimbursement Obligations priority status.

Despite the superficial resemblance between the obligation to reimburse a workers' compensation fund and the obligation to reimburse an unemployment compensation fund, none of the cases cited by the DOL are apposite to the issue before this Court. Only the Bankruptcy Court for the Southern District of New York in *Olga* and the Bankruptcy Appellate Panel for the Eighth Circuit in *Voightman* even attempted to link the reimbursement obligation at issue to a discrete prepetition transaction. *See Hynes*, 29 B.R. at 409 (failing to identify an underlying prepetition. transaction); *Camilli*, 94 F.3d at 1331 (same); *Hutchinson*, 135 B.R. at 891 (same). In *Olga* and *Voightman*, however, there was a clear pre-petition trigger -the transaction which caused injury to the worker. In contrast, courts that have considered a debtor's obligation to reimburse an unemployment compensation fund have been unable to identify any prepetition transaction that triggers the liability of the debtor.

Supreme Court, U.S.
FILED
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No. 04-1487

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY, DEPARTMENT OF LABOR,

Petitioner,

v.

RECONSTITUTED COMMITTEE OF UNSECURED CREDITORS OF UNITED HEALTHCARE SYSTEM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT IN RESPONSE TO BRIEF OF PENNSYLVANIA *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

SUMMARY OF ARGUMENT

1. Like the New Jersey Department of Labor ("DOL"), the *Amici Curiae* have not established a split among the United States Courts of Appeal that justifies granting DOL's Petition for a Writ of Certiorari (the "Petition"). The two Circuit Courts of Appeal that have confronted the legal issue presented in this case each agree that a non-profit employer's reimbursement obligation under unemployment compensation law is not entitled to priority treatment in bankruptcy. No Federal circuit decision cited by the *Amici Curiae* disagrees with these holdings by the First and Third Circuits and, thus, there is no split among the circuits on this issue.

2. In their effort to create an "important federal question," the *Amici Curiae* also overstate the impact of any failure of non-profit corporations to pay the reimbursement obligation on the financial health of the Federal unemployment compensation system created by the Federal-State Unemployment Tax Act, codified at 26 U.S.C. § 3301, *et seq.* ("FUTA"). Indeed, the very facts and figures presented by the *Amici Curiae* demonstrate that any defaults by bankrupt non-profit corporations in paying the reimbursement obligation has had a negligible impact on the unemployment compensation system and is not a sufficiently "important federal question" warranting the grant of the Petition.

ARGUMENT

I. LIKE DOL, THE *AMICI CURIAE* FAIL TO DEMONSTRATE THAT THERE IS A SPLIT IN THE CIRCUITS JUSTIFYING THE PETITION.

A. The *Amici Curiae* Admit that the Only Two Circuits to Address a Non-Profit's Reimbursement Obligation under FUTA Have Reached the Same Holding that the Reimbursement Obligation is not a Tax.

The *Amici Curiae* cannot show any conflict between the only two United States Courts of Appeal to address the bankruptcy priority of the Reimbursement Obligation[1] under unemployment compensation law. The *Amici Curiae* readily admit that the Third Circuit in this case and the United States Court of Appeals for the First Circuit in *Massachusetts Division of Employment & Training v. Boston Regional Medical Center, Inc. (In re Boston Regional Medical Center, Inc.)*, 291 F.3d 111 (1st Cir. 2002) ("*Boston Regional I*") reached the same conclusion: that a non-profit employer's Reimbursement Obligation under the unemployment compensation law is not a tax. Brief of Amici Curiae in Support of the Petition for Writ of Certiorari ("Amici Br.") 9 ("[T]he Third Circuit in this case, as well as the First Circuit, . . . have held that similar [reimbursement] claims are not taxes, but are instead ordinary debts owed to the State.").

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[1] Capitalized terms not defined herein shall have the meanings attributed to them in the Respondent's Brief in Opposition ("Resp. Br.").

B. The Other Federal Circuit Court Decisions Cited by the *Amici Curiae* Involve Assessments under Other Statutory Schemes and do not Demonstrate any Split among the Circuits Concerning the Bankruptcy Code's Treatment of a Non-Profit's Reimbursement Obligation.

Unlike the instant case and *Boston Regional I*, none of the *Amici Curiae*'s circuit court decisions involve the Reimbursement Obligation of any unemployment compensation law or the exemption from the compulsory, contributory quarterly tax on payroll provided to non-profit employers by the unemployment compensation statutes. Each of the cases cited by the *Amici Curiae* arises under different statutes with different public objectives. Importantly, none of these different statutory schemes provide non-profit corporations with an option to elect treatment different from that of other persons subject to the applicable statutory schemes.

Three of the decisions cited by the *Amici Curiae* were also cited by DOL and are already discussed at length in Respondent's Brief in Opposition. Resp. Br. 10-12 (discussing and distinguishing *Indus. Comm'n v. Camilli (In re Camilli)*, 94 F.3d 1330, 1333 (9th Cir. 1996), *Ohio Bd. of Workers' Comp. v. Yoder (In re Suburban Motor Freight, Inc.)*, 36 F.3d 484, 486 (6th Cir. 1994) ("*Suburban II*"), and *County Sanitation Dist. No. 2 v. Lorber Indus. (In re Lorber Indus.)*, 675 F.2d 1062, 1064-65 (9th Cir. 1982)).

The other five cases cited by the *Amici Curiae* do not establish a split in the circuits because they involve wholly-different statutory schemes such as: (a) the Federal Coal

Industry Retiree Health Benefit Act of 1992, which imposed an obligation on present or former employers of members of the United Mine Workers Union to pay retiree and health benefits to former mine workers and their spouses, *LTV Steel Company v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 498 (2d Cir. 1995); *United Mine Workers of America 1992 Benefit Plan v. Rushton (In re Sunnyside Coal Co.)*, 146 F.3d 1273, 1280 (10th Cir. 1998); (b) Federal pension law which, pursuant to 26 U.S.C. § 4980, imposed a flat tax on that portion of an over-funded employee pension plan which reverts to the employer after payment of all employee benefits required by the plan, *United States v. Juvenile Shoe Corp. (In re Juvenile Shoe Corp.)*, 99 F.3d 898, 901 (8th Cir. 1996); (c) Virginia's motor vehicle law which imposed a surcharge upon operators of uninsured motor vehicles, *Williams v. Motley*, 925 F.2d 741, 743-44 (4th Cir. 1991); and (d) West Virginia's workers' compensation statutes which imposed an assessment against employers for premiums to be paid to the workers' compensation fund. *New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund*, 886 F.2d 714, 720 (4th Cir. 1989).

Because the Third Circuit's decision is consistent with the only other circuit court to actually address the Reimbursement Obligation of the unemployment compensation statute, and because the other cases cited by the *Amici Curiae* do not involve a Reimbursement Obligation or the FUTA-mandated exemption through which a non-profit corporation can choose a Reimbursement Obligation in lieu of the contributory tax on payroll, there is no foundation to conclude that there is a split among the Federal circuits' holdings on this issue warranting the granting of the Petition.

II. THE *AMICI CURIAE*'S BRIEF ALSO DEMONSTRATES THAT ANY DEFAULT BY BANKRUPT NON-PROFIT CORPORATIONS TO PAY THE REIMBURSEMENT OBLIGATION HAS A NEGLIGIBLE IMPACT ON THE FUTA SYSTEM.

The *Amici Curiae* also fail in their effort to create an "important federal question."[2] Their own facts and figures demonstrate that any default by bankrupt, non-profit employers in paying the Reimbursement Obligation has had a negligible impact on the funding of the FUTA system.

By the *Amici Curiae*'s own reckoning, the FUTA tax credits to employers nationwide was $46.4 *billion* in 2003. Amici Br. 5-6 (citing FUTA Receipts versus Amounts Returned for Fiscal Year 2003, U.S. Department of Labor, Employment and Training Administration (DOLETA)). Yet the seven reported decisions on this issue cited by the *Amici Curiae*, Amici Br. 4-5, span almost ten years and represent a total default by the non-profit corporations of only slightly more than $26 *million*.[3] This represents less than 0.06% of the total value of FUTA tax credits received by employers nationwide. Likewise, this total obligation is but a drop in the $1.5 *trillion* bucket of the States' FUTA indebtedness to the Federal government. Amici Br. 6. This minute financial obligation clearly lacks the importance of

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[2] Significantly, the Massachusetts Attorney General, now joining the *Amici Curiae*, was the appellant in *Boston Regional I*, but did not petition this Court for Certiorari in that case because it presented an "important federal question."

[3] The exact figure is $26,077,000.

the question which the *Amici* suggest that this Court should consider.[4]

Because the actual amount of the Reimbursement Obligations that bankrupt non-profit employers may owe to the States is negligible when compared to the value of FUTA tax credits received by employers nationwide and the States' indebtedness to the Federal government under the unemployment compensation program, the issue presented by the Third Circuit's decision is not of significant importance to warrant granting the Petition.

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[4] Additionally, like DOL, the *Amici Curiae* ignore the recovery that the Reimbursement Obligation will receive even if it does not garner priority. For example, here, if the Third Circuit's decision stands, DOL will receive over 30% of its Reimbursement Claims as a general unsecured creditor of United.

CONCLUSION

For the reasons set forth herein, as well as those set forth in Respondent's Brief in Opposition, DOL's Petition for Certiorari should be denied.

Respectfully submitted,

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